No. 97-1337

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

STATE OF MINNESOTA, Minnesota Department of Natural Resources; RODNEY SANDO, Commissioner of Natural Resources; ARNE CARLSON, Governor of Minnesota; RAYMOND B. HITCHCOCK, Assistant Commissioner of Operations, Minnesota Department of Natural Resources,

Petitioners,

v.

MILLE LACS BAND OF CHIPPEWA INDIANS, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

JOINT APPENDIX
VOLUME VI, Pages 1510 to 1784

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March 7, 1836, Letter From Lewis Cass To Martin Van Buren, President Of The Senate

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

National Archives,
Bureau of Indian Affairs,
Letters Sent, Vol. 18.

War Department
March 7, 1836

To The Hon:

Martin Van Buren,
Presdt. of the U. S. Senate.

Sir,

In conformity with a resolution of the Senate of the 26th [Illegible], I have the honor to transmit extracts form such papers in this Department as furnish the information called for in relation to the extinguishment of the Indian title to lands in the vicinity of Green Bay and to those north of the Ouisconsin, and to those on the Ioway river.

From the nature of the country and the progress of Settlements west of Lake Michigan the Indians now holding lands in the vicinity of Green Bay can only be considered as temporary residents there. The time will soon come, when circumstances will require them to remove, and it appears to me that it will be much better to purchase out their title now, if they are disposed to sell, and transfer them to the country west of the Mississippi. Their position there, would be better in every point of view than it now is, as they would then consider their

residence permanent, and make their arrangements accordingly.

The uncertainty of their condition would be at an end, and they would be stimulated to new exertions. They will soon be brought into contact with dense Settlements of our citizens where they now are, and will be exposed to all those evils which necessarily result from a communication with them under such circumstances.

With respect to a purchase of the country north of the Ouisconsin, it is my opinion that such a measure would be useful so far as regards the region lying upon the Mississippi and extending back a reasonable distance from that river. There are a number of streams entering the Mississippi in that quarter which have valuable lands upon them, abounding in pine timber. Much of this land is no doubt desirable, and would if procured and offered for sale be soon occupied by Settlers. It is a sort of debatable region between the Chippewas and Sioux and being upon the frontiers of both of their countries I do not think its possession very important to either. By planting Settlements upon the left bank of the Mississippi, we shall intercept one of the principal avenues of communication between these unfriendly tribes, and we shall establish a respectable force in a quarter which is now very weak and exposed. And such a measure would be in consonance with the policy which has been adopted, of making the Mississippi itself, or the ceded country west of it, the barrier beyond which the Indian population shall be placed.

But these remarks do not apply to the country upon the heads of the Ouisconsin, and between there and Lake

Superior. This is a region which is not necessary, to the United States, at present, and which I think had better be left in the possession of the Indians.

The reservation upon the Ioway belonging to the Sacs and Foxes has become comparatively unimportant to those Indians, in consequence of the country around it having been ceded to the United States and being now in a course of Settlement. The *accompanying papers* will shew [sic] that the band which possesses it is desirous of ceding it to the United States. The great body of the tribe will soon occupy the country upon the Desmoines, and I think it would be expedient to purchase this tract, and to unite the whole of them where they will be beyond the reach of our Settlements.

I submit the *accompanying estimates* of the appropriations which are deemed necessary for the holding of Councils with the Indians, for the purpose of procuring the above mentioned cessions.

Very Lc.,

Lewis Cass.

**Extracts From Letter Dated June 4, 1847,
From William Medill, Commissioner Of Indian Affairs,
To Commissioners Verplanck & Mix**

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

National Archives

Illegible EXHIBIT NO. 7
Illegible Commission
Illegible No. 18-U

* * *

(Pltf. Ex. 31 in Docket No. 18-B)

(Page 7)

So far as I am aware it has been the impression that all the unceded lands of the Chippewas of Lake Superior & the Upper Missi., as well those east as those west of that river, were the common property of the whole, but, as you are aware, it has recently been represented that this is not the case, & that different bands claim exclusive title to different portions of it. The Department has not the information in its possession to enable it satisfactorily to determine this question. If necessary to be inquired into & to have respect to such exclusive rights in the negotiations, it must be ascertained in the best manner in your power in the Country, where you will have better sources of information. The enclosed copy of a memorandum furnished by Mr. Rice, in which it is represented that there are three divisions or parties of the Chippewas, each composed of different bands, & each claiming a separate and exclusive interest in different portion of the lands – contains the only information on the subject, in

the possession of the Dept. other than what may be derived from the treaties & the manner in which the annuities have been paid. Copies of the different treaties & a memorandum showing how the different bands stand with reference to the Annuities, accompany these instructions. If possible to avoid it, as it is a leading object with the Department to consider the Chippewas, and to have them think themselves one united people, with possessions & interests in common, especially for the future. And should you succeed in effecting a treaty with them, it should as far as possible be made clearly & unequivacably [sic] to express this meaning & intention.

* * *

Plaintiff's October 5, 1953, Request For Findings And Brief From *Mole Lake v. United States*. Court Of Claims, No. 451620 regarding 139 F. Supp. 938 (Ct. Cl. 1956).

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

* * *

For the reason that the swamp lands within plaintiffs' reservations had passed to the State of Wisconsin under the Swamp Land Act of 1850, hearings were held and evidence was taken by a commissioner of this Court and a report was rendered. Briefs were filed and arguments were made to the Court.

The asserted interest of the State of Wisconsin was disclosed by the Findings and arguments.

The Court determined that the State of Wisconsin should be given a right to be heard and on October 12, 1948, caused to be sent to the Governor and Attorney General of Wisconsin a notice of the pendency of the suit by plaintiffs and the rights of Wisconsin to intervene.

Finding No. 4.

By order of the Court on May 28, 1952, the hearings have been limited in the first instance to determination of liability.

II. TREATIES 1837, 1842

Finding No. 5.

On July 29, 1837, a treaty was negotiated with the Chippewas residing in Wisconsin and Minnesota[4]

[4] 7 Stat. 320, 2 Kapp. 491, Tr. 567

whereby a portion of the lands occupied by them was ceded to the United States.[5]

The Chippewa Nation is designated as a party dealt with, but in fact the parties were the bands comprising the group later known as "Chippewas of Lake Superior" and "Chippewas of the Mississippi".[6]

The treaty contained the following provisions:

> "Articles of a treaty made and concluded at St. Peters (the confluence of the St. Peters and Mississippi rivers) in the Territory of Wisconsin, between the United States of America, by their commissioner, Henry Dodge, Governor of said Territory, and the Chippewa nation of Indians, by their chiefs and headmen.
>
> "Article 1. The said Chippewa nation cede to the United States all that tract of country included within the following boundaries:
>
> "Beginning at the junction of the Crow Wing and Mississippi rivers, between twenty and thirty miles above where the Mississippi is crossed by the forty-sixth parallel of north latitude, and running thence to the north point of Lake St. Croix, one of the sources of the St. Croix river; thence to and along the dividing ridge between the waters of Lake Superior and those of the Mississippi, to the sources of the Ocha-sua-sepe, a tributary of the Chippewa river; thence to a point on the Chippewa river, twenty miles below the outlet of Lake De Flambeau; thence to the junction of the Wisconsin

[5] Royce Cessions No. 242, Minnesota 1, Wisconsin 1.

[6] Note signers from various groups.

and Pelican rivers; thence on an east course twenty-five miles; thence southerly, on a course parallel with that of the Wisconsin river, to the line dividing the territories of the Chippewas and Menomonies; thence to the Plover Portage; thence along the southern boundary of the Chippewa country, to the commencement of the boundary line dividing it from that of the Sioux, half a days march below the falls on the Chippewa river; thence with said boundary line to the mouth of Wahtap river, at its junction with the Mississippi; and thence up the Mississippi to the place of beginning.

* * *

"Article 5. The privilege of hunting, fishing, and gathering the wild rice, upon the lands, the lands, the rivers and the lakes included in the territory ceded, is guaranteed to the Indians, during the pleasure of the President of the United States."

Finding No. 6.

On October 4, 1842, a treaty was negotiated with the same bands and groups of Chippewa Indians and some bands residing in Michigan[7] whereby the remaining lands owned and occupied by them in the western portion of the northern peninsula of Michigan and in northern Wisconsin were ceded to the United States.[8]

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[7] 7 Stat. 591, 2 Kapp. 542, Tr. 568

[8] Royce 261, Michigan, Wisconsin. Plf. Ex. 49, Tr. 616, Report of Commissioner 1843

III. REMOVAL

Finding No. 7.

Under the terms of these treaties the Indians were permitted the usual temporary privilege of remaining upon the lands so ceded until they should be required to remove by the President.[9]

Finding No. 8.

The privileges of the Indians to remain upon the ceded lands during the pleasure of the President were common to many

* * *

Finding No. 10.

On February 6, 1850, the President of the United States issued an order terminating the temporary right

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[9] Treaty July 29, 1837, Article V.
"The privileges of hunting, fishing and gathering the wild rice upon the lands, the rivers and the lakes included in the territories ceded is guaranteed to the Indians during the pleasure of the President of the United States."

Treaty of October 4, 1842, Article II:

"The Indians stipulate further right of hunting on the ceded territory with the other usual privileges of occupancy until requested to remove by the President of the United States, and that the laws of the United States shall be continued in force with respect to their trade and intercourse with the whites until otherwise ordered by Congress."

of these Indians to remain upon said lands,[15] as follows:

> "The privileges granted plaintiffs by the aforesaid treaties with respect to the use of the ceded lands were revoked by Executive Order of February 6, 1850, which is on file in the National Archives (File O.I.A. Executive Orders, I-347-1850), and reads as follows:
>
> "The privileges granted temporarily to the Chippewa Indians of the Mississippi, by the fifth article of the treaty made with them on the 29th of July, 1837, 'of hunting, fishing and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded' by that treaty to the United States; and the right granted to the Chippewa Indians of the Mississippi and Lake Superior, by the second article of the treaty with them of October 4, 1842, of hunting on the territory which they ceded by that treaty 'with the other usual privileges of occupancy until required to remove by the President of the United States', are hereby revoked; and all of said Indians remaining on the lands ceded as aforesaid, are required to remove to their unceded lands.
>
> (Signed) "Z. TAYLOR
>
> "Executive Office
> Washington City, February 6th, 1850.
>
> "By the President
> (signed) "T. EWING
> Secretary of the Interior."

---

[15] Def. Ex. 31 (W. 42, Tr. 134)
Letter February 1, 1850, Brown, Commissioner, to Ewing, Sec.
Letter February 6, 1850, Ewing, Secretary, to Brown.
Order February 6, 1850.
Def. Ex. 1, Tr. 12, (Wis. Ex. 43, Tr. 136)

Finding No. 11.

By this order of February 6, 1850, all of these Indians remaining upon the ceded lands were required to move to their

* * *

Many of the Indians did not remove. To effect their removal $25,000.00 was appropriated in 1850.[19] In 1851, $25,000.00 was again appropriated for the same purposes.[20] 2,000 of these Indians were finally removed to Minnesota in 1851.[21] Opposition to their removal developed.[22] In 1859, $10,000.00 was appropriated to remove Lac Court O'Reilles and Menominee Indians to Minnesota.[23]

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[19] Act of September 30, 1850, 9 Stat. 544, 567, W. Ex. 17, Tr. 125.

[20] Act February 2, 1851, 9 Stat. 570, 572.

[21] W. 64, Tr. 156, Letter December 26, 1851, Governor Ramsey to Commissioner Lea.
W. 65, Tr. 157, muster rolls of Indians removed west of the Mississippi (included members of Lac du Flambeau, Bad River and Lac Court O'Reilles bands.
W. 67, Tr. 159, Petition 1851, by Chippewa Indians (indicates removal of members of both Lac du Flambeau and Lac Court O'Reilles bands).

[22] W. 58, Tr. 149, letter May 5, 1852, Commissioner Lea to Superintendent Stuart.
W. 59, Tr. 151, letter March 18, 1852, Agent Watrous to Secretary American Board of some missions.
Def. Ex. 32 (W. 60, Tr. 153)
Letter July 30, 1850, Secretary Giddings to President.

[23] Act March 3, 1859, 11 Stat. 43.

Finding No. 12.

The order of February 6, 1850, was never revoked nor extended.[24] The period for the removal of the Menominee Indians was extended.[25]

Finding No. 13.

The effect of the order of February 6, 1850, was to terminate the temporary right of these Indians to live upon these lands.[26]

Finding No. 14.

In 1854, the Government promised to provide homes for the Indians remaining in Wisconsin by agreeing to

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[24] W. Ex. 41, Tr. 131, letter July 21, 1931, Rhoades, Commissioner, to Kuehl, Assistant Attorney General, Wisconsin.

[25] W. Ex. 61, Tr. 154, Order September 5, 1850, President Fillmore.
W. 17, Tr. 125, Letter November 27, 1851.
W. 62, Tr. 154, Letter March 28, 1851, Commissioner Lea to Superintendent Stuart.
W. 63, Tr. 155, Letter June 1, 1852, Commissioner Lea to Secretary of the Interior.

[26] U. S. v. Wisconsin, 273 U.S. 769,
W. 170, Tr. 496, Answer of Wisconsin.
Lemiux v. Agate Land Company, 214 N.W. 454.
Plf. Ex. 40.

carve reservations out of the areas ceded in 1837 and 1842.[27]

* * *

---

[27] W. 17, Tr. 125, Report Commissioner 1852, Pgs. 544, 545, 547 and 548.
W. 17, Tr. 125, Report Commissioner 1854, Pgs. 4-5.
Def. Ex. 4 (W. 69, Tr. 163.
Letter March 22, 1859, Mix, Commissioner, to Supt. Cullen.
Letter April 23, 1859, Mix, Commissioner, to Supt. Cullen.
W. 58A, Tr. 304, Letter October 21, 1863, Commissioner Mix to Governor Gorman.

Portions Of The July 1971 Additional Findings Of The Indian Claims Commission In Docket 18-C, 22 Ind. Cl. Comm. 22, p. 45.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

* * *

26 Ind. Cl. Comm. 22

In the main, agricultural products were grown for local consumption and for markets along the Mississippi. The rapid expansion of the lumber industry in the subject area provided a substantial market for agricultural products. The interplay of the two industries, lumbering and farming, was a distinctive feature of northern Wisconsin history. The first settlers worked their farms during the growing season and worked in the woods in the winter. The timber development of the area took precedence. Agricultural development came second. There were 4,723,972.24 acres of land suitable for agriculture and 1,732,055 acres of swampland in the subject area.

The 1840 census showed that 212,116 bushels of wheat, 11,062 bushels of barley and 406,514 bushels of oats, had been grown in Wisconsin in 1839. In the next decade Wisconsin agriculture expanded at a great rate. In 1849, there were over one million acres of improved farm land and nearly two million acres of unimproved farm land. Wheat production was 4.3 million bushels, and oat production was 3.4 million bushels. Livestock had a value of $4.9 million.

The soil ratings in the subject area were: 783,339 acres first rate, 6,419, 884 acres second rate, and 6,098,967 third rate.

18. In 1830, the territories of Wisconsin and Minnesota had a population of about 5,000. By 1840 about 31,000 people were in Wisconsin Territory. Population growth continued at a rapid pace through the next decade. Between 1840 and 1850, Wisconsin's population increased tenfold, from 30,945 to 305,391.

* * *

January 10, 1972, Pleading Filed With The Indian Claims Commission By The Minnesota Chippewa Tribe, In Docket No. 18-S, Regarding Proposed Findings Of Fact And Objections To Defendant's Proposed Findings Of Fact.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

BEFORE THE INDIAN CLAIMS COMMISSION

MINNESOTA CHIPPEWA TRIBE, et al.,	)	
Plaintiffs,	)	Docket No. 18S
v.	)	
UNITED STATES OF AMERICA,	)	
Defendant.	)	

PLAINTIFFS' REPLY TO DEFENDANT'S OBJECTIONS TO PLAINTIFFS' PROPOSED FINDINGS OF FACT

PLAINTIFFS' OBJECTIONS TO DEFENDANT'S PROPOSED FINDINGS

PLAINTIFFS' REPLY BRIEF

Rodney J. Edwards
800 First American Bank Building
Duluth, Minnesota 55802

Attorney of Record
for Plaintiffs

Of Counsel:

Marvin J. Sonosky
1225 – 19th Street, N.W.
Washington, D. C. 20036

January 10, 1972

* * *

Objection to defendant's Finding 8 (Game and Fish). The plaintiffs have no objection. The fisheries did have value and were an asset to the land.

Objection to defendant's Finding 9 (Timber production). (*Plaintiffs' Findings 22 and 23.*) There is no part of the defendant's recitation that is not more adequately covered in the plaintiffs' Findings 22 and 23, primarily the latter.

Since Norway pines were "mixed with white and jack pine" in addition to forming large stands of their own, doubtless the mixed portion was cut with the white pine. The literature indicates a lack of substantial demand for Norway before about 1870. On this point, plaintiffs' quoted Hotchkiss, a recognized authority, in their Finding 23, pp. 48-49. Defendant also cites but does not accurately reflect Hotchkiss when it states "* * * Norway pine was altogether avoided until 1875." (Def. p. 21, 2d sentence.) That is not what Hotchkiss said. See the quotation from Hotchkiss in Pls. Fdg. 23, pp. 48-49. In any event, Norway pine was present and was a resource entitled to value. *Minnesota Chippewa Tribes v. United States,* 305 U.S. 479, 481, where the Supreme Court implicitly criticized the Court of Claims for giving no value to timber other than merchantable white and Norway pine.

* * *

Portions Of August 25, 1995, Affidavit Of Berge Hansen, Landowners' Expert Real Estate Appraiser

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Mille Lacs Band of Chippewa Indians, Arthur Gahbow, Walter Sutton, Carleen Benjamin, and Joseph Dunkley, Plaintiffs, United States of America, Plaintiff-Intervenor, St. Croix Chippewa Indians, et. al. Lac Du Flambeau Band, et. al. Bad River Band of Lake Superior, et. al. Lac Courte Oreilles Indians, et. al. Sokaogon Chippewa Community, et. al. Red Cliff Band of Lake Superior, et. al. Plaintiff-Intervenors, vs. State of Minnesota, Minnesota Department of Natural Resources, and Rod Sando, Commissioner of Natural Resources, Defendants, County of Aitkin, Benton, et al., John W. Thompson, et al., Defendant-Intervenors, Save Lake Mille Lacs Association, *Amicus Curiae.*	Civil No. 3-94-1226 Judge Michael J. Davis Magistrate-Judge Jonathan G. Lebedoff **AFFIDAVIT OF BERGE HANSEN**

STATE OF MINNESOTA)
) SS:
COUNTY OF HENNEPIN)

Berge Hansen, being first duly sworn on oath, does state and aver:

1. My name is Berge Hansen, and I have been retained to act as an expert witness for the six Landowners who are defendants in the above captioned litigation. I am a principal in the firm of Newcombe & Hansen Appraisals, Inc., and I have been professionally appraising property for over 33 years. I am an M.A.I. Certified Appraiser. Attached hereto as Exhibit A is a true and correct copy of my qualifications as an appraiser, and the information set forth on Exhibit A accurately sets forth my experience and credentials as an expert in appraisals and valuations of real property interests. I incorporate the contents of Exhibit A herein as part of my Affidavit. My opinions are based upon my experience, my review of certain documents, and upon appraiser guidelines generally relied upon by myself and professionals in my field, which includes the guidelines set forth in the attached Exhibits. The facts and opinions that I have set forth herein are well accepted by appraisers and individuals and professionals involved in real property conveyances, and by the laws and standards utilized by appraisers both now, and during the 1830's through the 1990's.

2. I am aware that at least some of the Bands who are parties to the above captioned litigation participated in proceedings before the Indians Claims Commission

and were subsequently awarded monies for claims made against the United States regarding the 1837 Treaty at issue in the above-captioned lawsuit.

3. An usufructuary right is the ability to take the fruits of the lands and waters. It includes the right to draw from the real property the profit, utility and advantage which the property may produce provided this occurs without altering the substance of the property. A profit a prendre is an easement plus the right to use another's real property by removing portions of the soil or its products. Usufructs, profits a prendre, licenses, and franchises, may exist separately from full fee title and can be held by someone other than the fee owner. When the terms "usufruct", "profit a prendre", "franchise", "license" are utilized in real property conveyances, a profit a prendre is considered an interest in land; a license is considered an interest to land; an usufruct is considered an interest to land; and a franchise, if it refers to a geographically defined area, is considered an interest in land and an incorporeal hereditament. A hunting, fishing and rice gathering privilege must be one of these real property interests depending in part upon the language of the grant.

4. When an appraisal and valuation is properly made with regard to real property held in full fee simple title, one way to calculate fair market value of full fee simple title is to base fair market value on the highest and best use of the land and water areas within the boundaries of the area to which fee is held. When this process is undertaken, the fair market value figure arrived at includes any hunting, fishing, or rice gathering privilege.

It also includes all real property licenses, profits a prendre usufructs, or franchises applying to the area of the fee. In other words, if a party other than the full fee owner of a parcel held a profit a prendre, a real property license, an usufructuary right, or a franchise applicable to the same parcel, since these interests in or to land make up part of the bundle of sticks comprising full fee ownership, the fair market value of the fee owner would be reduced since he would not hold all of the bundle of sticks comprising full fee ownership.

5. Attached hereto as Exhibit B is a true and correct copy of the cover page, and pages from a publication entitled "The Appraisal of Real Estate", Tenth Edition, which is published by the Appraisal Institute, a non-profit appraiser's trade organization that provides research materials and continuing education materials to appraisers. Attached hereto as Exhibit C is a true and correct copy of the Appraisal Institute's June 1992 Value Definitions. Also attached as part of Exhibit C is the June 1993, Volume 3, No. 6 publication entitled "Appraiser News" that I receive as a member of the Appraisal Institute. I include herein by reference as part of my Affidavit testimony, the contents of Exhibits B and C.

6. When real property ownership interests are appraised, one generally accepted method of appraisal is to evaluate the value in terms of the highest and best use. It is my opinion that an appraisal and valuation of land and water areas based on a highest and best use, incorporates by reference all other possible uses of the land and all usufructuary rights which would include, without limitation, fishing, hunting, and rice gathering uses. My opinion is the same whether these uses are usufructs,

privileges, profits a prendre, licenses, or franchises applicable to certain geographically defined areas.

7. It is my opinion that if an appraisal or calculation based on a highest and best use does not include an offset for any retained hunting, fishing, or rice gathering uses, the valuation includes the fair market value of all hunting, fishing and rice gathering uses whether they are classified as privileges, usufructuary rights, profits a prendre, licenses, or a franchises applicable to the appraised area.

8. In my opinion, to the extent there was no offset provided to the United States by the Indian Claims Commission for any retained hunting or fishing or rice gathering use, if any of the Bands or Tribes that received monetary compensation from the Indian Claims Commission in docket 18-C, or their members, are allowed to hold or exercise the 1837 Treaty privilege, I believe that those Bands would be achieving an additional recovery for the same claims for which the Tribes and/or Bands had already been fully paid, based upon a fair market valuation of the highest and best use of the lands and waters acres in the 1837 ceded territory.

9. Because the Indian Claims Commission factored in the water acreages within the 1837 ceded territory when fashioning its monetary award in Docket 18-C, based upon the highest and best use of the areas ceded by way of the 1837 Treaty, all uses of those waters, including but not limited to fishing, would have been included in the fair market value, and the monetary award would have included payment for uses of the waters as well as the lands.

FURTHER YOUR AFFIANT SAITH NOT.

/s/ Berge Hansen
Berge Hansen

Subscribed and sworn to before me this 25th day of August 1995.

/s/ Julie A. Melugin
Notary Public

(SEAL)
JULIE A. MELUGIN
NOTARY PUBLIC - MINNESOTA
HENNEPIN COUNTY
My Commission Expires Jan. 31, 2000

Clifton, The Lac Courte Oreilles Band Of Chippewa And The Treaties Of 1837, 1842, And 1854: A Research Report (August 30, 1980)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

MILLE LACS BAND OF CHIPPEWA INDIANS, *et al.*, Plaintiffs,	)	
UNITED STATES OF AMERICA, Plaintiff-Intervenor,	)	
and	)	Civil No. 3-94-1226
ST. CROIX CHIPPEWA INDIANS OF WISCONSIN, *et al.*, Plaintiff-Intervenors,	)	
vs.	)	
STATE OF MINNESOTA, *et al.*, Defendants,	)	
COUNTY OF AITKIN, *et al.*, Defendant-Intervenors,	)	
JOHN W. THOMPSON, *et al.*, Defendant-Intevenors,	)	
and	)	
SAVE LAKE MILLE LACS ASSOCIATION, *Amicus Curiae.*	)	

EXHIBIT A TO PLAINTIFF AND PLAINTIFF-INTERVENOR BANDS' SUMMARY JUDGMENT MEMORANDA

(Filed September 18, 1995)

THE LAC COURT OREILLES BAND OF CHIPPEWA
AND THE TREATIES OF 1837, 1842, AND 1854:
A RESEARCH REPORT

by

James A. Clifton
Professor of Anthropology and History
University of Wisconsin – Green Bay

August 30, 1980

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* * *

"It is my desire that our Great Father and his lawyers shall make these things right with my people. We think the lands still belong to us – we have never sold the lands. When our Great Father shall have made these things right with our people, we will be satisfied – then and not until then."

Speech of Blackbird
Spokesman for Council
of Wisconsin Chippewa Chiefs.
September 12, 1869.
Bad River (200:2).

CITATIONS

All citations of documents and sources in the text are given by document number and page in parentheses, for example, (200:2) or (173).

ABBREVIATIONS USED

ARCOIA	Annual Report of the Commissioner of Indian Affairs
COIA	Commissioner of Indian Affairs
LCO	Lac Court Oreilles Band of Lake Superior Chippewa
NAM	National Archives and Records Service Microcopy
21	Office of Indian Affairs, Letters Sent, 1824-1881
T58	Office of Indian Trade, Letters Received, 1806-1824
200	The Territorial Papers of the United States Senate, 1789-1873
234	Office of Indian Affairs, Letters Received, 1824-1881
236	The Territorial Papers of the United States: Wisconsin Territory
348	Report Books of the Office of Indian Affairs, 1838-1885
T494	Documents Relating to the Negotiations of Ratified and Unratified Treaties with Various Indian Tribes, 1801-1869
574	Office of Indian Affairs, Special Files, 1807-1904

668	Ratified Indian Treaties, 1722-1869
NARS	National Archives and Records Service
NRC	National Records Center (by city)
MHSC	Minnesota Historical Society Collections
OIA/BIA	Office of Indian Affairs/Bureau of Indian Affairs
R	Microcopy roll or reel number
SHSW	State Historical Society of Wisconsin
SIA	Superintendent of Indian Affairs
WHC	Wisconsin Historical Collections
WMH	Wisconsin Magazine of History
WSHSLA	Wisconsin State Historical Society Library Archives

Foreword

On July 11, 1980 I was requested by Mr. Howard J. Bichler of Wisconsin Judicare, Incorporated, to prepare a research report dealing with the Lac Court Oreilles Band of Chippewa, as regards their involvement in the treaties of St. Peter's, July 29, 1837 (7 Stats., 536), the Treaty of La Pointe, October 4, 1842 (7 Stats., 591), and the Treaty of La Pointe, September 30, 1854 (10 Stats., 1109). The report was also to concern the effort on the part of the United States to cause the Lac Courts Oreilles band to abandon their traditional territory and to resettle in eastern Minnesota during the winter of 1850-1851, subsequent efforts of the United States to cause this band to settle or concentrate on the reservation guaranteed them in the 1854

treaty, and further efforts of the United States to cause them to abandon both their traditional band territory and the reservation due them under the 1854 treaty and to resettle elsewhere.

The research report was to be focused particularly upon the understandings the Lac Court Oreilles Chippewa had concerning their rights to exploit and use certain natural resources within the areas covered by these treaties, especially so their understandings of the rights they had not surrendered, including hunting, trapping, fishing, and gathering wild rice and other natural products in these areas. The major emphasis of the report was to be upon the period following the 1854 treaty, especially so the years after establishment of the surveyed Lac Court Orielles reservation in 1873. However, because the Lac Court Oreilles Chippewa were not regular occupants of the areas involved in the 1842 and 1854 treaties, and because of their peculiar involvement in the treaties of those years, we will have to consider the intervening period as well.

The areas involved are designated as Royce 242 for the 1837 treaty, Royce 261 for the 1842 treaty, and Royce 332 for the 1854 treaty (182:Maps, Michigan 1, Minnesota 1, and Wisconsin 1).

In this report I shall use the phrase Lac Court Oreilles Band of Chippewa (hereafter abbreviated as LCO) to refer to the population that inhabited and intensively exploited a portion of Royce 242 as of July 29, 1837, as well as their successors and descendents who, after 1873, were based upon the reservation assigned them that year in present Sawyer County, Wisconsin. In the report of the Great

Lakes-Ohio Valley Research Project prepared on behalf of the United States Department of Justice for Indian Claims Commission cases, this LCO band portion is identified as Royce 242C. I here recognize that Royce Area 242C consisted of the LCO band territory and that, as of 1837, it included a number of permanent summer villages: at least two on upper Namekagon River, one at Lake Chetac near the source of the Red Cedar River, at least one at Court Oreilles lake, one at Red Cedar Lake, and one on the main branch of the Chippewa River above its confluence with the Court Oreilles River. Area 242C thus included the southeastern part of present Bayfield County, the western two-thirds of Sawyer County, the western half of Rusk County, most of Barron County, and parts of Chippewa, Dunn, and St. Croix counties. Hereafter, I will refer to this area, 242C, as the LCO band's territory, range, or estate (83:25 & 145-51; Maps 1 & 3; Also Doc. 181, 1830 Map).

Beginning in 1837 the LCO band was increasingly affected by various policies and activities of the United States and its agents. These must be understood in some detail as they were specifically applied to the LCO band. For this reason, to provide salient, particular historical context, this report incorporates brief discussions of several policies of the United States with respect to dealings with the LCO and related Chippewa bands. The Indian Removal policy of the 1830s is one such, as well as the alternative policy of Indian land cession and consolidation upon smaller estates that was accomplished without removal west of the Mississippi River. The abortive effort during the 1840s on the part of the United States to

develop a second "Northern" Indian Territory as an alternative location for emmigrating Indians is a second such topic. A third and particularly important topic consists of the customary protocols for land cession and removal negotiations between the United States and Indians of the Old Northwest that were in use by the parties to such negotiations by 1830.

I. Relevant Aspects of LCO Economy, Culture, and Values as of 1837

The constituent villages that made up the LCO band were clustered within Royce 242C along watercourses. Most of the band's hunting, trapping, fishing, and gathering of natural foods and materials occurred within this territory on a seasonal basis. The Virginia or White-Tailed Deer was by far the most important game animal, and increasingly its hides were important in trade. Deer were most abundant in the southern reaches of the LCO estate in the ecotone or "edge," the region of an intergradation of mixed forest and savanna vegetation. Intensive hunting of the abundant deer herds in this "edge" was limited only by chronic warfare with the Sioux, with whom the Chippewa had long been in competition over this area.

On the other hand, deer were very infrequently found in heavily forested regions, particularly so in pine forests, except in limited areas where there were openings or prairielands. With a few exceptions, deer were infrequently found in substantial numbers near the LCO band's permanent summer villages after 1800, and there is good evidence that the deer herd as well as other game and fur-bearing animals in the entire LCO estate and

adjacent regions had been declining sharply after 1800, reaching a low-point in the 1830s.

The Chippewa population in the whole of Royce Area 242 averaged approximately one person per eight to twelve square miles, a low density determined by available technology, Chippewa skills and value orientations, climate, soils, and forest cover. The LCO and other "interior" Chippewa were "emphatic hunters" with little taste for fish. Their seasonal economic round included hunting and trapping away from the summer villages in late fall and winter; maple sugar production in late winter and early spring near the permanent villages; very limited gardening in summer; berrying and fishing near the summer villages; and wild rice production in early fall. This seasonal round required careful timing of each economic activity according to the availability of the supply, and it involved also periodic migrations of part or the whole population away from or back to the permanent villages. The LCO people hunted large game and trapped furbearers at some distance from the summer villages in winter for commercial and subsistence purposes, and fished, gathered, and hunted closer to these villages in spring and summer for consumption and limited trade purposes. LCO males, like other interior Chippewa, were entirely averse to horticultural work, which was considered labor strictly appropriate to women and children. Horticultural production was very limited, confined mainly to beans and squash, although by the 1820s potato cultivation had been introduced by traders to counter increasing food shortages that interfered with winter trapping.

Although the LCO generally confined their subsistence and commercial hunting, trapping, fishing, and gathering to the lands within their territory, they also regularly engaged in these activities while traveling to and from other locales for purposes of trade, war, and diplomacy. The most notable economic development during the 1830s affecting the LCO band was the sharp decline in the fur trade, which caused considerable impoverishment, reducing their ability to acquire manufactured goods, tools, and weapons on which they were by then quite dependent.

The maximal political organization of the Wisconsin Chippewa in this period was at the village/band level. That is, the villages that made up the LCO band were, especially with respect to their territorial rights, autonomous of other Chippewa bands – there was no such political entity as a Chippewa "nation" or "tribe," (80, 81, 82, 83, 86, 88, 111, 140, 170).

II. The Indian Removal Policy of the United States After 1830

The general aims of the Indian Removal Policy were to acquire the lands of Indians residing east of the Mississippi River, to displace them from these lands, and to resettle or "colonize" them in the Indian Territory established southwest of the Missouri River. By the early 1830s American officials in the region recognized that the Chippewa and neighboring tribes in the Old Northwest were largely if not unalterably averse to migrating out of the

regions they then inhabited to this Indian Territory. Consequently, starting in the early 1820s, a second "Northern" Indian Territory was proposed, and this scheme remained alive throughout the 1840s. Indeed, through much of this period Wisconsin itself was proposed as the site of this Northern Indian Territory, while in the late 1830s Minnesota became the favored site. Nonetheless, because of profound opposition from some of the tribes, including the Chippewa, this Northern Indian Territory was never established (76:15, 24-25, 48-49; 78:19-22, 24-29).

The provisions of the Indian Removal Act need to be specifically emphasized, since it was this legislation and policy that was subsequently used to legitimize efforts to dispossess the LCO band under the treaties of 1837 and 1842 and to cause their removal and relocation west of the Mississippi River in 1850-1851. The specific provisions of the Indian Removal Act were as follows:

1) to establish a specified territory west of the Mississippi River as a destination for emigrating eastern Indians

2) to award reservations in this Indian Territory in exchange (i.e., as partial compensation) for the lands ceded in the east

3) to obtain the informed consent of the Indians involved before they could be displaced or removed westward

4) to grant permanent titles to the new reservations

5) to compensate the Indians for improvements on the lands they had ceded

6) to provide aid and assistance to the emigrating Indians

7) to provide subsistence for one year after arriving at the new location in the west (171).

In addition to these provisions that were specified in the Indian Removal Act, additional provisions were generally discussed in removal negotiations and embodied in treaties that obligated the Indians concerned to abandon their former estates and migrate west to their new reservations. These special provisions included:

1) a specification that the Indians involved would abandon their former estate and begin the migration by a given date

2) the stipulation that the Indians could not hunt, fish, or plant crops in the old estate after a given date

3) the provision for an exploring party to examine and approve the new lands before the Indians could be required to remove.

Examples of obligatory removal treaties with Indian Tribes in the Old Northwest that exemplify the provisions of the Indian Removal Act and the administrative protocols that were developed to carry it out are as follows: Seneca, 28 February 1831, 7 Stats., 348; Shawnee, 8 August 1831, 7 Stats., 355; Chippewa, Ottawa, and Potawatomi, 26 September 1833, 7 Stats., 431; Potawatomi, 29 March 1836, 7 Stats., 498; Chippewa, 9 May 1836, 7 Stats., 503; Miami, 28 November 1840, 7 Stats., 582; and Wyandot, 17 March 1842, 11 Stats., 581.

There persisted during the 1830s and 1840s an older policy of the United States that involved acquisition of a portion of a band or tribe's estate with the expectation that the population would thereupon fall back upon their remaining lands, or else simply migrate elsewhere voluntarily. This alternative policy of land-base reduction was sometimes pursued as a preliminary to a removal treaty, sometimes as an alternative thereto, particularly when the Indian group involved resisted removal from its old estate. This alternative policy is of special interest in the case of the Chippewa, since influential American officials such as Henry R. Schoolcraft and Lewis Cass were convinced that, as a people dependent upon hunting, they would simply move away from the advancing American frontier as the game supply was diminished and disappeared. Hence a common American expectation during the 1830s was that it was unnecessary to press for an obligatory removal treaty with peoples such as the Chippewa, who were bound to disappear before the edge of the American frontier anyway (76:21-23).

During President Jackson's administration a definite set of customary protocols for negotiating land cession and removal treaties with the Indians of the Old Northwest were developed and perfected. These protocols included the announcement of a treaty negotiation beforehand, which was followed by discussions among the Indians involved and the acceptance of an invitation to negotiate. Thereafter, at the negotiation site, there was full public discussion of the terms and implications of the treaty, an adjustment of differences, and the tentative approval by both the Indian and American negotiators. Thereafter, should either the President or the Senate

ammend the terms of the treaty, it was again referred to the Indians for a final approval, at which point it would be proclaimed by the President (74:7-10; 76:55-56).

III. The LCO Band and the Treaty of 1837

The 1837 Treaty of St. Peter's is known to historians as a "lumberman's" transaction by virtue of American concerns with gaining access to and control of the vast virgin pine forests along the upper Mississippi River and its tributaries. At that time there was an intensive spurt of town and city building in Illinois, Missouri and adjacent states, and pine timber had formerly to be imported from western New York and Pennsylvania via the Ohio River at very high transportation and stumpage costs (140:87; 168:159-60; 179:147; 384).

By early 1837 some of the Chippewa bands from Area 242 had indicated their willingness to sell the right to cut pine timber in their territory, and had become involved in contractual relations with several individuals and combines. Governor Henry Dodge of Wisconsin Territory thereupon proposed to the Secretary of War a treaty with the Chippewa to acquire these pine lands, with the avowed purpose of blocking what he saw as a logging monopoly by the American Fur Company. His proposal was approved, and he was sent instructions for a treaty with the Chippewa (84:53-55, 637, 672-74; 92; 93; 94; 98).

These instructions included the following specifications:

1) Dodge was to acquire Chippewa lands that were rich in pine timber and unfit for agriculture.

2) He was instructed to discover from the Wisconsin-Minnesota Chippewa whether they were willing to have the Michigan Ottawa and Chippewa share their lands in the interior of Wisconsin.

3) He was *not* instructed to acquire hunting, fishing, gathering, and trapping rights in the areas to be ceded, and he was *not* instructed to arrange for the removal of the Chippewa bands involved from their lands. These matters were not so much as mentioned in the COIA's instructions to Dodge.

In the arrangements for the treaty negotiation Dodge refused to negotiate with the Chippewa band by band as they requested. Instead, he insisted upon negotiating with an entity he called the "Chippewa nation," a fictional aggregation which had no reality in Chippewa thinking or sociopolitical organization. Agent L. Taliaferro at St. Peters, et. al., then arranged for the so-called "Mississippi" bands of Chippewa, especially the Pillagers, to conduct the treaty negotiations and to virtually exclude the interior Wisconsin bands, including the LCO, from these transactions. It should be emphasized that the lands involved in this negotiation, Royce 242, were not occupied or claimed by the "Mississippi" bands, including the Pillagers; however, they were occupied and claimed by the LCO and neighboring bands (179:148; 177:611; 103).

It happens that we have an unusually full and detailed journal of what transpired at the 1837 negotiation, supported by contemporaneous Wisconsin Chippewa petitions and commentaries on the transaction. At the treaty grounds the Mississippi bands arrived early

and in great force, numbering over one thousand, and promptly took the lead in the negotiations. However, they informed Dodge they could not conclude a treaty without the presence of the interior Wisconsin bands who actually occupied the lands. Three weeks later there arrived a few Chippewa from the Lake Superior shoreline and from the interior of Wisconsin, numbering about eighty. Nonetheless, the negotiations were dominated throughout by the Mississippi bands. Of the some six to eight villages in the LCO band territory only one had representatives at the treaty grounds. These were We-Non-Ga-Be (The Wounded Man) and Ke-Wab-Se (The Old Man), neither of whom signed the treaty. The only LCO representative to sign the treaty was Pa-Qua-A-Mo, an otherwise unidentified and unknown personage. Throughout the treaty negotiations the Mississippi bands spokesmen stressed and insisted that they were ceding only their pine trees, not the hardwood forest, nor the streams or lakes. None of the LCO or other interior Wisconsin Chippewa leaders participated actively and publically in the debates.

During the negotiations Dodge repeatedly stressed that the Americans wanted only the "pine lands," which he argued were valueless to the Chippewa. The official spokesman for the Mississippi bands, Ma-Ge-Ga-Bow (The Trap), from Leech Lake, argued that the Chippewa were retaining hunting, fishing, trapping, and gathering rights in the pine forest areas together with the deciduous forest areas in other parts of the region. Dodge replied that the usual rights of occupation of the land would prevail "during the pleasure of the President," and that it would be a great many years before the lands would be

wanted. After the treaty had been marked, Dodge then offered an engrossed copy thereof to a leading chief to be nominated by the assembled Chippewa. None volunteered their services and none were nominated, whereupon the young Hole-In-The-Day from the Pillager band, who had been amply rewarded by Agent Taliaferro, advanced himself and took the document (177:611; 95; 178; Part I:178-79; 100:4-5; 99:1-7; 1:17, 55, 155; 200).

Conclusions:

1. There is no clear evidence of deception or trickery at this treaty negotiaion, except for the American promoted tactic of negotiating with the non-existent "Chippewa nation," of systematically favoring non-residents and non-claimants of the area ceded, the Mississippi bands, and of similarly promoting the exclusion of the LCO and other actual residents and claimants of Area 242 from the negotiation proper.

2. However, there was certainly a great deal of ambiguity and confusion during the negotiation. Certainly, the Chippewa negotiators left St. Peter's convinced that they had sold Americans only the right to cut the standing pine timber in Area 242, and temporary use of the lakes and streams for logging purposes. Just as certainly they left the treaty ground convinced that they had retained the right to occupy and enjoy the usufrucht of the area; their behavior at the treaty negotiations and in subsequent years is unintelligible in any other terms. Similarly, Governor Dodge left the treaty grounds convinced that he had acquired what Americans called "title" to the area. There is little evidence that Dodge made much effort

during the negotiations to clarify these confusions and ambiguities.

3. It is doubtful if more than a few Chippewa from the bands occupying and claiming Area 242 had any understanding of what was being transacted. Very few were present; they did not participate actively in the negotiation; and Dodge made no special effort to insure that they understood what he wanted or to secure their agreement. Consequently, I conclude that the LCO Chippewa band did not give its informed consent to the arrangements for and the terms of the treaty of 1837.

4. It must be stressed that throughout the negotiations of the 1837 treaty none of the specific provisions of the Indian Removal Act were raised or discussed, nor were they included in the treaty document. Therefore, I conclude that the LCO people did not give its informed consent to abandoning their occupation and use of their band territory, Area 242C, for the obvious reason that they were not asked to so in specific terms comprehensible to them.

5. Subsequent events make it clear that the 1837 treaty was made at the expense of the LCO and neighboring bands for the benefit of the Mississippi bands and, to some extent, the Lake Superior Bands. The following year Governor Dodge arranged that the benefits of the treaty, annuity payments, goods, and services, should be made available only at La Pointe and the mouth of the Crow Wing River, places outside of an remote from the centers of population in Area 242, in spite of requests from Area 242 Chippewa for payments and services nearer their villages (102; 104; 190). The effect of this would have been

to draw the interior Chippewa away from the areas and activities most important to their economic needs at a critical season of the year, the time of the fall wild-rice harvest. However, because of the regularly delayed delivery and payment of the annuities, the very small value of the annuity per capita, the practice of paying only those Chippewa who actually made the trip (thereby excluding the aged, ill, and otherwise occupied), and the distances involved, the LCO and neighboring bands as a whole never received more than a fraction of the payments promised them.

6. To these considerations I add the fact that the COIA specifically instructed Dodge to look into arrangements for relocating the Michigan Ottawa-Chippewa within Area 242 and draw the conclusion that the Treaty of 1837 was not intended to cause the removal of the LCO band from its estate. I also infer that Governor Dodge may well have been conducting himself on the basis of the prevailing opinion that Chippewa hunters would simply move away from edge of the American frontier. I similarly infer that the plan of delivering the 1837 annuities and services outside of and to the far north and west of Area 242 was calculated to encourage that same effect.

IV. The LCO Band and the Treaty of 1842

In contrast to the 1837 treaty that of 1842 is known as a "miner's" transaction. It was precipitated by a "copper rush" on the region along the south shore of Lake Superior. Also in contrast to the 1837 negotiation, in 1842 the treaty commissioner, Robert Stuart (SIA, Detroit) did not keep a journal of the negotiation. Several months later he

provided the COIA only a brief two paragraph sketch of what had occurred and how the treaty was obtained. It was not until two years later when Stuart came under severe criticism for his conduct at the negotiation that, in his own defense, he reconstructed from memory two speeches he allegedly delivered to the Chippewa before the negotiations started (87:79; 140:87; 179:48).

By 1841 the movement to develop a "Northern Indian Territory" was well underway and in that and the following year traders L. Warren, H.L. Dousman, H.H. Sibley, and Governor Doty of Wisconsin Territory informed the Secretary of War that the Wisconsin Chippewa would gladly move westward of the Mississippi when asked to do so. Needless to say, all had vested interests in obtaining a treaty and in the removal project. However, it was the "copper rush" that precipitated fast action to obtain a cession from the Chippewa. On August 1, 1842 SIA Stuart was appointed as treaty commissioner by the COIA (6:401; 85:297-301, 357; 86:399; 113:114; 115; 117; 120:1-9, 16-17, 25-26, 30-41; 100:6-8; 121; 123; 124; 178:287-88).

The COIA's instructions to Stuart included the following specifications:

1) Stuart was to obtain uninterrupted control of the whole south shore of Lake Superior for commercial [i.e., the Lake Superior fishery, lumbering] and mining purposes.

2) The Chippewa in the area were to be required to remove from the area ceded (Royce 261) to the part of the [Chippewa "national"] estate that remained west of the cession.

3) All Chippewa [i.e., the Lake Superior bands, the Mississippi bands, and the interior Wisconsin bands, including the LCO] were to participate in the annuity and other payments for the 1842 cession. That is, Stuart was instructed to treat the Lake Superior shoreline as the common property of the Chippewa "nation" so as to facilitate the treaty negotiation and to justify using the remaining lands (Royce 332; etc.) as the common property of all Chippewa.

4) He was to inform the Chippewa that they were not likely to be required to remove for a considerable time, with no stated term except the ambiguous "at the pleasure of the President" (114).

As the treaty was finally approved by the Senate it included the following terms (7 Stats., 591):

1) Article II: a stipulation for hunting and the usual privileges of occupancy until required to remove by the President.

2) Article III: when removal was ordered, all the unceded lands of the Fon du Lac, Sandy Lake, and Mississippi bands were to be treated as the common property of all Chippewa parties to the treaty.

3) Article V: a statement to the effect that the whole country between Lake Superior and the Mississippi River had always been considered as belonging in common to the Chippewa participating in the treaty, but that the Lake Superior bands had not participated in the 1837 treaty annuities. Hence, thereafter all unceded lands were to be held in common, and the 1837 and 1842 annuities

and payments were to be divided equally between all participants.

4) The stipulation that Chippewa in those parts of the area ceded adjacent to mining operations were to be removed at the pleasure of the President.

Commissioner Stuart, as indicated, did not keep a journal of the 1842 treaty negotiation. His report on the transaction consisted of a short letter and a paragraph in his 1842 annual report to the COIA, neither of which contain any useful information. When he was subsequently and repeatedly attacked by the Chippewa chiefs and the United States Indian Agent at La Pointe for the tactics he employed to obtain a treaty from the Chippewa he provided additional information. It is from these complaints and from Stuart's own admissions that we can reconstruct salient aspects of the 1842 treaty negotiation (6:401-402; 86:489-90; 118; 120; 121; 123).

Stuart employed the fiction of the "Chippewa nation" that had been used to good effect for the 1837 transaction; and he added the embellishment of a principle of "majority rule," which was designed to overcome the strong resistance of the Lake Superior bands' chiefs to the terms of the treaty. He offered the Mississippi bands (including the LCO and other interior Wisconsin bands) half the proceeds for the sale of the Lake Superior bands' territories.

At this point it is important to emphasize that the Mississippi bands (20 chiefs) and the interior Wisconsin bands' (12 chiefs) delegations greatly outnumbered the Lake Superior bands' representatives (9 chiefs), so that the combination of special rewards and the new principle

of majority rule made agreement on the treaty a foregone conclusion. It is also important to note that by 1842 the Mississippi bands had been employed by the United States on two occasions to obtain the cession of major territories that they did not occupy, use, or claim, without the consent or over the strong objection of the bands who actually occupied, used, and claimed the lands.

Stuart also stressed and insisted that a decision on the sale of the Wisconsin mineral region in 1842 was of no importance because the Chippewa nation had already ceded these areas to the United States at the Treaty of Fon du Lac, August 5, 1826 (see 7 Stats., 290). When strong opposition to the treaty, its terms, and Stuart's tactics was raised by the chiefs of the Lake Superior bands, Stuart refused to allow them to voice their objections in council.

The Lake Superior bands were further coericed into signing the 1842 treaty by the tactic of having the Mississippi bands sign the treaty first, and their numerical preponderance, with the principle of majority rule, carried the day for Commissioner Stuart. An examination of the treaty indicates that the twenty chiefs of the Mississippi bands, from Crow Wing to Fon du Lac, signed the treaty first, followed by the nine Lake Superior shoreline chiefs, and then the twelve chiefs from interior villages, with the three LCO chiefs marking their "Xs" last of all.

It is further evident that Commissioner Stuart hurried the proceedings through to a conclusion, not allowing the delegations to discuss the terms fully or to develop opposition to his tactics. Moreover, the opposition was profound and near violent: the night before the signing of the document the Lake Superior warriors

armed themselves and planned to resist the treaty with a show of force, but this was put down by having the traders go among them persuading them to cease and desist. It is noteworthy that seven of the eleven witnesses to the treaty as well as the man employed by Stuart as secretary, between them received $21,912 of the $75,000 paid for debts, and that an additional $37,994 of this amount was paid over to John Jacob Astor, Stuart's recent employer.

Finally, when La Pointe Indian Agent Alfred Brunson transmitted the complaints and protests of the Lake Superior Chippewa concerning the terms of the treaty and Stuart's tactics to his superiors, Stuart brought countercharges against Brunson and the latter was discharged from the Indian Department. Similarly, when the Lake Superior chiefs continued to complain about the treaty, Stuart recommended that they be threatened and deposed and other chiefs be appointed in their place (123:2-9).

Conclusions:

1. In the instance of the 1842 treaty I find clear evidence of deception, trickery, unwarranted coercion, and the intentional perversion of the truth to force the Lake Superior Chippewa bands into parting with Royce Area 261. In particular, the three fictions of a Chippewa "nation," a "national estate" involving joint, shared ownership, and the "majority rule" principle were concepts entirely alien to Chippewa belief, custom, and practice. Clearly, these were stratagems designed by officials of the United States to serve their ends. Similarly, the coercive tactics

employed by Commissioner Stuart were designed and employed to subvert and to overwhelm the opposition of the Lake Superior bands, who actually occupied, used, and claimed Area 261, and to reward the Mississippi bands for their cooperation. Stuart's argument that the Chippewa had ceded their copper mining rights in 1826 is an example of the deception he employed. Had the Senate, the President, or the COIA believed this there would have been little reason for the 1842 negotiation; it is noteworthy that this argument was not part of the COIA's instructions to Stuart. This mineral issue was added onto the 1826 transaction in a negotiation that had been requested by the Chippewa at the Treaty of Prairie du Chein in 1825 to secure agreement from all Chippewa bands as to boundaries between themselves and the Sioux. At this transaction American negotiators apparently secured the privilege, without compensation to the Chippewa, of exploring for minerals and of carrying away specimens, such as the famous copper "boulder" at Ontonagon (168:306; 177:122, 241-45; 179:148).

2. In part the 1842 treaty reflected the unsuccessful efforts of the COIA to create and populate a "Northern Indian Territory," which was to be inhabited by tribes from the Old Northwest and New York. This proposed development would have involved application of the provisions of the 1830 Indian Removal Act to these tribes.

3. However, none of the specific requirements and provisions of the Indian Removal Act discussed above were incorporated into the 1842 negotiation and treaty. The Lake Superior bands claiming Area 261 were not allowed to give their voluntary and informed consent; they were

not offered reservations in the west as partial compensation for the lands ceded; they were not offered or granted perpetual title to these new reservations; they were not offered or granted compensation for improvements in Area 261; they were not offered aid and assistance in migrating or rations for a year after arriving in the west; there was no date specified after which they were prohibited from occupying and enjoying the usufrucht of Area 261; and they were not offered the opportunity to explore the new reservation before giving their consent to migration. Moreover, none of these provisions were part of the instructions sent Stuart by the COIA. Therefore, I conclude that in 1842 the United States did not plan for the legitimate application of the Removal Act to the Lake Superior Chippewa. Apparently, it was believed that they would simply be dislodged at some indefinite future period by American development and settlement upon the Lake Superior Shoreline.

4. In part, the 1842 treaty also reflected the aim of the United States to gain control of the mining areas, the commercial fishery on Lake Superior, and the pine forests in or adjacent to Area 261. It is noteworthy that the Lake Superior Chippewa afterwards, regardless of their complaints about the tactics employed in obtaining the treaty, remained convinced that they had ceded only the specific areas containing minerals and the pine timber.

5. Irrespective of the legitimacy of the negotiation and the tactics employed in securing the 1842 treaty, which may possibly be construed as bearing upon subsequent rights of the Lake Superior Chippewa within Area 261, this negotiation and treaty did not discuss, mention, or alter the rights of the LCO band within Area 242C. The

LCO band was only tangentally involved in the 1842 treaty. They did not occupy, use, or claim Area 261. They had come to La Pointe only to receive their annuities and had not been informed of American plans for a treaty. They were thereupon drawn into the negotiation by Commissioner Stuart who manipulated them and the Mississippi bands so as to realize his aims. Finally, it is unmistakable that the LCO band understood then and subsequently that their rights within Royce Area 242 were unaffected by the 1842 Treaty of La Pointe.

V. The LCO Band and the 1850-1851 Removal Attempt

Although the Lake Superior bands of Chippewa had been promised during the 1842 treaty negotiations that they could remain on and use their lands for a great many years – which they understood as meaning at least during their own lifetimes and those of their children, or for fifty or one hundred years or more, within a year after the ratification of the document the first moves were made to move them westward out of Area 261. However, SIA Stuart and COIA Crawford both recommended against removal at that time on the grounds that their presence in Area 261 in no way interfered with mining operations and that this step was not in conformity with the "spirit" of the 1842 treaty (6:368; 108:2-3; 124; 125).

Nonetheless, over the next seven years the removal issue was repeatedly raised, eventually resulting in considerable confusion among American officials. One issue in doubt was the new location for the Wisconsin Chippewa, whether it was to be in the remaining "common lands" in present northeast Minnesota (Royce Area 332),

or whether it was to be west of the Mississippi River entirely in the proposed Northern Indian Territory. In 1846 COIA Medill indicated that the United States preferred the westernmost location, adding that the Wisconsin Chippewa could not be relocated there without an additional treaty. In the same period Governor Dodge refused to give his support to the removal of the Wisconsin Chippewa on the grounds that he was not convinced it would benefit them, but he changed his position a year later. In 1847 an attempt was made to secure a treaty ceding the remaining north shore lands (Area 332), but this failed when the Chippewa refused to negotiate. By then the United States had recognized that the north shore lands contained valuable copper deposits as well as pine forests. By this time also the seperate Lake Superior shoreline and interior Wisconsin Chippewa bands had begun to combine their interests in opposition to American stratagems. Long treated by American officials for their own purposes as if they were a single "nation," at last some Wisconsin Chippewa leaders began thinking, for limited purposes, as if they were, pooling their weaknesses to develop a more united front, and rejecting American efforts to manipulate their divisions and differences. However, both territorial and federal officials were then agreed that the preferred location for the Wisconsin and the north shore Chippewa was west of the Mississippi entirely (11:8-9; 12:388; 13:94-95, 210; 14:4; 86:112, 1054-57, 1067, 1076, 1080-81, 1089-91, 1096; 126; 127; 130; 135:4-7; 136:9-16; 137:19-23; 138).

A second and more convenient confusion involved the LCO and other interior Wisconsin bands in American plans to dislodge all Chippewa from Wisconsin. Either

because of ignorance of the terms of the 1837 treaty, which involved the LCO band but did not obligate them to remove westward, or because the terms of that document had been confused with those of the 1842 treaty, in which the rights and tenure of the LCO band was not involved, or because officials had simply and conveniently lumped all of the Wisconsin bands together, the LCO band was made subject to a scheme to force them temporarily into the unceded land in present eastern Minnesota before moving them further west, beyond the Mississippi River (11:89; 12; 14:4, 51, 61-63, 88-90; 126; 127; 130; 145; 146).

This was the historical background to the situation that developed in 1849: the Lake Superior bands and the interior Wisconsin bands were combining their interests in opposition to further land cessions and to the issue of removal. Thus in 1849 COIA Medill became convinced that both groups of bands were firmly obligated to abandon their territories and to migrate westward on the orders of the President under his interpretation of the terms of the 1837 and 1842 treaties. His opinion prevailed, at least temporarily, in spite of frequent reports of the fact that the Chippewa held quite different views of their obligations and rights, including a report that they were so fearful of removal and official trickery that they would not allow themselves to be counted for a census. Thereby, in February, 1850 COIA Brown recommended that President Taylor issue a removal order, which the president soon did, together with an order revoking Chippewa "privileges" of hunting, fishing, and gathering in Areas 242 and 261. It is clear that this effort was part of a plan to revive the faltering Northern Indian Territory

and to raise the pressure for a cession of the north shore lands, Area 332. The scheme involved several steps: first, dislodging the Wisconsin Chippewa from their lands and temporarily locating them at Sandy Lake near Fon du Lac in northeastern Minnesota, then a cession of Area 332, and finally their removal west of the Mississippi (136:12; 141; 142; 143; 144).

The actual temporary removal of portions of the Wisconsin bands during the winter of 1850-1851 was accomplished in several well orchestrated steps; and the result was an unqualified human disaster. First the La Pointe Agency was closed and its functions moved to Sandy Lake. Then the Wisconsin Chippewa were refused their 1850 annuities and services under the 1837 and 1842 treaties except at that distant location. Next the adult males were required to bring with them their families before they could receive their annuities. The migration proper was accompanied by no planning for aid or services by the United States, and grossly inadequate planning for their maintenance once they arrived at the newly established agency. Moreover, the officials responsible for this effort deliberately and consciously planned to delay delivery of annuity goods and rations until winter had set in, so as literally to trap the migrants at Sandy Lake. Thus the Chippewa who actually traveled to the new agency began arriving on September 10, already dangerously late in the season for them. They had then to wait until December 3 before their rations and annuity goods were finally delivered to them. Meanwhile, they had to subsist on the inadequate and spoiled stocks available at Sandy Lake, and they lost the entire benefit of their normal fall subsistence work, the wild rice harvest, the lake fishing,

and the early winter hunt. It should be stressed again that this scheme was deliberately planned by COIA Brown, SIA Ramsey, and Sandy Lake Agent Watrous. Throughout, the Chippewa, who had been tricked into the trip to Sandy Lake, continued to protest that they were not obligated to remove (140:87-89; 175:177-78; 152; 178, Part 11:288-90; 183; 180:50-51).

The winter removal of 1850-1851 and its disasterous human consequences caused a storm of protest from the Chippewa and their supporters, especially certain traders and missionary organizations, for the result of this removal effort had been a very large number of Chippewa deaths from starvation, exposure, and freezing. How many casualties there were cannot be determined with any exactness, since first-hand reports are conflicting. However, multiple sources indicate that no fewer than 100 and possibly as many as 400 Chippewa died in consequence of the steps taken by American officials. Chief Buffalo at La Pointe may have been exaggerating, but he reported that the Chippewa took a count of their own dead and that 170 had perished at Sandy Lake while waiting for their annuity payments and rations, while another 230 died after the Chippewa abandoned their canoes to walk back to their Wisconsin villages. Chief Buffalo's calculation may likely be the more accurate figure, since American officials apparently estimated only the number of adult male deaths, not the more vulnerable women and children (150; 151; 152; 178:290).

Efforts to bring about a removal continued through part of 1851, with Agent Watrous recommending that the same tactics be employed a second time. It is not clearly

documented that any LCO Chippewa were involved in the 1850 temporary move to Sandy Lake. The elder LCO Chief had refused to cooperate with the effort, but a younger leader, Wakiwanse (The Old Man) later did so, fearful that his people would lose their annuities entirely if they did not go to Sandy Lake. However, no rations or annuities were provided his group because the removal order had been rescinded later in 1851. Thus Wakiwanse and some of his people were stranded, starving, near Fon du Lac through December 1853, until an Indian Department farmer, backed by several Americans nearby, took it upon himself to distribute emergency rations and clothing to Wakiwanse's group (14:61-63; 88-90; 148; 149; 155; 156; 157; 158).

Protests from the Chippewa and their allies reached Washington by August, 1851, so that the Secretary of the Interior, obviously acting under presidential instructions, ordered a cessation of the removal effort, allowing the Chippewa to remain in Wisconsin in their band territories. Once resettled in Wisconsin, both the Lake Superior shoreline bands and the interior bands were firmly determined to resist further removal attempts at all costs, and they demanded punishment of the parties responsible and compensation for their losses. Again their grounds were that they were not obligated to leave their territories by the treaties of 1837 and 1842. Meanwhile, Agent Watrous, seconded by the COIA, reported that nearly all the Wisconsin Chippewa had been removed and resettled in Area 332. Their reports were obviously falsified: a few pages later in the same ARCOIA the La Pointe missionary reported that his school had continued in operation uninterrupted throughout 1851 while the school at Bad River

had been closed only temporarily due to the absence of the teacher. The Wisconsin Chippewa, with the exception of a few still stranded near Fon du Lac, were back in their villages (152; 158; 15:4-5, 166-70; 153; 188; 150; 151).

However, by 1851 the bargaining position of the Wisconsin Chippewa was not strong. Treated by American settlers and agents of the United States as technically landless squatters within their own band estates, as soon as they commenced clearing land or making other improvements, an American was likely to file a preemption claim on them. But the United States still wanted to acquire title to Area 332, to which the Wisconsin Chippewa in 1842 had been assigned an interest under the joint ownership doctrine. Thereby, the Chippewa employed this as a negotiating lever to secure greater security for themselves and their villages in Wisconsin. They shortly received unexpected allies. A new president, Franklin Pierce, brought a new Secretary of the Interior into office, and with him a new COIA, George W. Manypenny.

COIA Manypenny was unalterably opposed to the removal policy and quickly brought it to an end. Shortly, new area superintendents and Indian agents were appointed who supported and reflected Manypenny's policies. It was in this changed policy and administrative atmosphere that the Wisconsin Chippewa prepared for their final treaty negotiation in 1854.

At this juncture the position of the LCO and other interior Wisconsin bands should be clarified. Unlike both the Mississippi bands, who were attached to the St. Paul superintendency with its sub-agencies conveniently near

their villages, and the Lake Superior shore bands, who were managed from the nearby La Pointe agency, the LCO band and its neighbors were very isolated. Moreover, as we have seen, they believed themselves bound only by the agreements of the 1837 treaty in which they had been lumped with the Mississippi bands. However, they were geographically and politically closer to the Lake Superior bands, with whom they shared an antagonism to the Mississippi bands, the experience of the abortive removal, and the constant threat to their tenure of their Wisconsin band territories. Moreover, they had regularly been treated as one political unit by the United States since SIA Stuart invented the "single-nation, common estate" doctrine in 1842, and especially so since COIA Medill had confounded their obligations under the 1837 treaty with the requirements of the 1842 document. Therefore, like the Lake Superior bands, the LCO band had a profound interest in clarifying their right to remain in Wisconsin within their old band territories, their right to reserved lands on which they could locate their villages and to which they had exclusive, perpetual claim without threat of preemption by American settlers, and their right to refuse removal out of the area.

Conclusions:

1. The attempt of the Office of Indian Affairs to force the removal of the LCO and neighboring bands out of Areas 242 into Area 332 was a subterfuge aimed at dislodging them entirely from Area 332 as well and into the "Northern Indian Territory" west of the Mississippi.

2. The coercive tactics employed against the LCO band, as well as the removal proper, cannot be justified by either the 1837 treaty, which contained provisions for no such step, or the 1842 treaty, in which they were only marginal participants, and which made provisions only for the bands within Area 261.

3. Similarly, the tactics employed cannot be justified under the specifications of the 1830 Indian Removal Act which governed situations such as these, since the LCO band had been provided none of the privileges and guarantees provided for under that legislation.

4. None of the interior Wisconsin bands, including the LCO, believed they were obligated to abandon their territories and migrate westward under their understanding of the 1837 treaty. They saw the removal effort as a punishment for delicts they were unaware of.

5. The COIA in 1850 had either confused the rights and obligations of the LCO band under the 1837 treaty with those he saw as derived from the 1842 document, or else he was ignorant of the provisions of the 1837 accord.

6. The best construction I can place on this entire episode is that it represented a sorry abuse of administrative power on the part of the Office of Indian Affairs and its officials. In any regard, the removal experience further threatened the already insecure relationship between the LCO band and their estate. Therefore, as the issue of the negotiation of a cession of Area 332 approached, the LCO as well as allied bands had a vital need to use their limited bargaining position to clarify their rights to remain and subsist themselves within their old territories.

VI. The LCO Band and the Treaty of 1854

When George W. Manypenny became COIA in 1853 he moved quickly to end the removal program and to introduce a new policy essentially aimed at assimilating Indians into the "mainstream" of American life as small-scale farmers. This involved developing an appreciation for private property in land and the introduction of farming and allied practices and skills. The policy was based on the powerful American image of an independent rural proprietor making his own way through agricultural labor on his own land. The ideal, as it was expressed in Manypenny's and later policy directives, was so strong that it often overrode any considerations that may have interfered with its realization, including conflicting value orientations, inadequate land-base and inappropriate soils, insufficient economic development in-puts, and unsuitable climate (79).

Manypenny's policies were expressed in a series of treaties mainly involving tribes who had been removed and resettled in Indian Territory (present Kansas and Oklahoma), although some were drawn with tribes remaining in the Old Northwest. Examples of these Manypenny treaties in 1854 are those with the Oto and Missouri, the Omaha, the Iowa, the Shawnee, the Sauk and Fox, the Kickapoo, and the Miami (10 Stats., 1038, 1043, 1053, 1069, 1074, 1078, and 1093, respectively).

The basic provisions of these Manypenny treaties included the following:

1) Cession of the whole reservation and retention of a lesser included part thereof.

2) A survey of the reserved portion with allotment and patenting of farmsteads to individuals.

3) Economic development in-puts, including farmer-teachers, tools, starter cattle, etc.

4) A prohibition on the payment of tribal annuities to traders for individual debts.

5) Tribal relinquishment of all claims against the United States for privileges, monies, services, and any other thing, releasing the United States from any obligation to provide or guarantee same, for which relinquishment the United States paid the tribe.

6) A stipulation that the tribe would abandon its traditional economic activities.

We should appreciate that the situation of the LCO, other Chippewa bands, and other Indian communities in Wisconsin and Minnesota was not the same as that of the removed and resettled tribes in Indian Territory, and Manypenny recognized this fact. The LCO, like some neighboring Indian populations, still occupied and subsisted off parts of their old estates. They had not been dislodged and resettled in the west. And they retained and enjoyed usufrucht rights under former treaties, however unclear and qualified these may have become in the thinking of American officials because of defects, omissions, and ambiguities in the treaties of 1837 and 1842, and because of the efforts of the Office of Indian Affairs to ignore or over-ride these rights and privileges.

Well before the 1854 treaty the LCO band and other Wisconsin Chippewa, through councils with agents, petitions, and delegations to Washington, had made their intention to remain in Wisconsin and their desire for reserved lands manifest. COIA Manypenny recognized this as a fact to be considered in planning for the 1854 negotiation. Hence he assumed that arrangements would have to be made for one or more reservations for Wisconsin Chippewa within their old territories. He also understood, as he subsequently reported, that Americans in Wisconsin and in Minnesota Territory did not object to their remaining (134; 154:4-5; 168).

No detailed journal of the 1854 treaty was kept. However, Manypenny provided extremely detailed instructions for the treaty to Commissioners Gilbert and Herriman, and Gilbert delivered substantial reports of what had transpired and why certain provisions were included in the treaty, while no serious complaints about the 1854 negotiation were subsequently forthcoming from the Chippewa involved to raise doubts about the integrity of these reports or the legitimacy of the negotiations (159; 160; 162; 87; 161; 100:13-19; 178; Part 11:293-302).

COIA Manypenny's instructions were contained in a sequence of letters to Commissioners Gilbert and Herriman in August, 1854. These instructions were as follows:

1) No treaty negotiations were to be attempted unless the chief and three or four of the head men of each band were present, including the Mississippi, Lake Superior, and interior Wisconsin bands.

2) A maximum of $600,000 was to be offered for all unceded Chippewa lands in Wisconsin, Minnesota, and elsewhere – estimated to total 10,743,000 acres. The sum was to be paid over a period of 20 to 30 years.

3) The Chippewa were be allowed to retain up to 743,000 acreas set aside for their use as permanent reservations. The COIA indicated that he preferred one or two large reservations but that if the Chippewa bands insisted they might be assigned smaller reservations in their band territories.

4) Provisions for allotments of 80 acres per individual were to be made, with subsequent patents to be assigned.

5) The commissioners were to conceal the additional purpose of their mission (which was nominally an annuity payment), apparently so as to prevent interference from traders.

6) The commissioners were to try to cancel obligations for such blacksmiths and farmers that were provided for in earlier treaties as could be dispensed with should the Chippewa agree to consolidate on one or two reservations.

7) At the specific request of the Senate Committee on Indian Affairs, the commissioners were to attempt to include a stipulation allowing the President to commute annuities into a fund establishing farms among and for the Chippewa.

It should be noted that COIA Manypenny *did not* instruct the 1854 commissioners to negotiate for certain important provisions that were generally included in other treaties made under his personal supervision in 1854 and 1855. The closest he came to this was by directing Gilbert's attention to the 1854 Oto and Missouri treaty as an example for the 80 acre allotment provisions. The stipulations Manypenny did not specifically request for the 1854 Chippewa treaty included:

1) An agreement that they would abandon their traditional economic pursuits and adopt a settled agricultural life.

2) An agreement trom the Chippewa surrendering or relinquishing all claims and privileges they had been guaranteed under former treaties; particularly the 1837 and 1842 treaties.

With several exceptions, the various Minnesota and Wisconsin bands were all present and well represented at the 1854 treaty council at La Pointe. In contrast to the 1837 and 1854 negotiations, however, the Lake Superior Shoreline and the interior Wisconsin bands far outnumbered the Minnesota (or Mississippi) bands. Because of extreme bitterness between the Minnesota and the Wisconsin bands, they would not meet jointly in council, and the Minnesota (or Mississippi) bands refused to negotiate for the sale of their band territories in any terms. Thereupon, the commissioners suggested a boundary line seperating the two groups, which was agreed to, as was a division of the annuities due under former treaties.

At this juncture the LCO and the Lac du Flambeau bands abandoned their former association with and linkages to the Mississippi bands and aligned themselves with the Lake Superior shoreline bands, which aggregation was thereafter to be known as the "Chippewas of Lake Superior." Thereupon the treaty was negotiated. The commissioners were able to obtain a cession only of Royce Area 332, much less territory than they had been directed to acquire. The commissioners also stressed in their reports that the Chippewas of Lake Superior strenously insisted upon retaining band reservations within their old territories, without which no treaty at all would have been possible. They estimated that the Chippewa reserves would total 486,000 acres, with another 32,000 in 80 acre allotments to half-breeds (161).

As finally approved by the Senate the Treaty of 1854 incorporated the following provisions:

1) Cession of Royce Area 332, which had theretofore been "held in common with the Mississippi" bands.

2) Seperate reservations for the bands in Royce Areas 242, 261, and 332.

3) A survey of the reservation, with 80 acre allotments and patents to be assigned.

4) Payment for the cession, including $380,000 distributed in annual installments of coin, goods, agricultural implements, cattle, and educational services; $90,000 to pay debts with traders; and $6000 in goods delivered at the next annuity payment. *Of very special*

interest in Article 4 of this treaty is the provision for the delivery of 200 guns [i.e., smoothbores], 100 rifles, 500 beaver traps, $300 in ammunition, and $1000 in ready made clothing to the young men at the next annuity payment.

5) The provision of a blacksmith and assistant at each reservation during the term of the annuity and thereafter at the descretion of the President, *"in lieu of all employees to which the Chippewas of Lake Superior may be entitled under previous existing treaties."* (emphasis mine).

6) Prohibition of the use of tribal annuities to pay individual debts.

7) Prohibition on liquor on the reservations.

8) Agreement on the division of annuities due for the 1837 and 1842 treaties between the Mississippi bands (1/3rd) and the Lake Superior Bands (2/3rds).

9) An investigation of sums due and unpaid under former treaties and the payment of same.

10. Allowance for missionaries, teachers, and others to prempt land already occupied within the area ceded.

11. Specification of the places of payment of the annuities.

12. Special considerations and payments to the Bois Forte band.

The treaty was signed with the Lake Superior shoreline bands leading off, the Fon du Lac band (from area 332), the LCO and the Lac du Flambeau bands, and,

finally, the Mississippi bands. There can be no doubt that this treaty was legitimately and openly negotiated with, by, and for the newly designated demoninated Chippewas of Lake Superior, which included the LCO band, which had a very substantial delegation of chiefs and head men present and signing the treaty.

Conclusions:

1. The 1854 treaty commissioners were not instructed by COIA Manypenny to obtain from the LCO band a cession or surrender of all rights and privileges obtaining under the 1837 and 1842 treaties, including the right to hunt, fish, and gather wild foods and substances from the band's territory, Royce 242C. Similarly, the commissioners were not instructed to obtain from the LCO band a stipulation that they agreed to abandon their traditional economic pursuits and to settle upon and confine their economic pursuits to the designated reservations. There is no hint or suggestion that these issues were even mentioned during the treaty negotiations; and the treaty document proper extracts no such concessions from the Chippewa.

2. COIA Manypenny was certainly aware that the LCO band was largely dependent upon hunting, gathering, and trapping throughout its territory. At the first annuity payment in 1855, when Manypenny was visiting La Pointe, a LCO head village chief, Na-Naw-Ong-Ga-Be (Dressing Bird), told him: "I am not like your red child that lives on the borders of the Chippewa Lake [i.e., Lake Superior] – he desired you to bring him the irons to spear the fish, and small twine he uses in dropping his hook

into the water. I told you, my father, I live principally in traveling through my home in the forest, by carrying the iron [i.e., gun] on my shoulder, – that whenever I aim at the wild animal, he falls before me." Like pronouncements had regularly been made in previous years (91:343; 86:692). Similarly, Manypenny was certainly aware that the LCO band could not subsist by agricultural work given their skills and dispositions and the climate, soils, and forest cover of the area their reservation was to be located in.

3. It is manifest that COIA Manypenny had ample opportunity to issue instructions calling for the LCO band's relinquishing their rights to hunt, gather, trap, and fish, and for men to settle into agricultural pursuit had he seen fit. In the series of successive letters written to the treaty commissioners he expressed a variety of second-thoughts and qualifications, with no hint or suggestion of these matters. Moreover, these stipulations were specifically writtened into treaties negotiated under Manypenny's personal supervision, both in Indian Territory and in the Great Lakes region, in 1854 and 1855. That is to say, the absence of these stipulations is not, I conclude, an oversight or an omission on the part of American officials, nor is it an instance of ambiguity. Instead, I conclude that Manypenny and other officials fully recognized that the LCO band was dependent upon hunting and gathering in their territory, and the 1854 treaty as written reflects this fact.

4. Moreover, the specific elimination of the farmers provided by previous treaties, and the provision for blacksmiths on each reservation clearly indicated that the LCO and allied bands did not intend to settle into agricultural

pursuits on the reservations and that American officials recognized and sanctioned this, since blacksmiths were employed by the Chippewa bands to repair their guns, traps, and maple sugar gear. Further, the provision in Article 4 awarding the Chippewa young men guns, rifles, beaver traps and ammunition is an additional declaration of Chippewa intentions along this line, and American sanctioning of their plans. Hence, I conclude that both American and Chippewa negotiators intended that the latter would continue hunting and gathering for both subsistence and commercial purposes on and off their designated reservations within the band territories.

5. The very modest provision for farming implements, tools, and cattle in other parts of the treaty do not detract from this interpretation. These did not represent a significantly large or adequate agricultural development in-put, sufficient to produce a major shift in Chippewa subsistence strategies. Instead, they likely represent both American and Chippewa recognition that in some of the bands a few families were engaged in more intensive horticultural activities, as well as an in-put into the traditional gardening activities of some Chippewa women.

6. Therefore, I conclude that from the viewpoints of both the Chippewa and the American negotiators at the Treaty of 1854, the Chippewa bands involved, including the LCO band, did not surrender their rights to hunt, trap, fish, and gather wild foods and substances from throughout their band territories, rights and privileges carried over from the 1837 and 1842 treaties and before. This conclusion is further reinforced by the fact that the treaty commissioners did not obtain from the Chippewa the one stipulation that COIA Manypenny most stressed

in his instruction, the Senate sponsored proposal that the Chippewa grant the President the right to commute all annuities into a farm development fund.

7. It is noteworthy that the LCO band did not occupy, use or claim the ceded lands, Area 332, and that those bands that did in Article 11 of the 1854 treaty were granted the right to hunt and fish in Area 332 "until otherwise ordered by the President," the same rights the LCO band continued to enjoy in Area 242 under the terms of the 1837 treaty.

8. I conclude, finally, that in the negotiations for the 1854 treaty the LCO band and its neighbors were allowed to realize their stated goals to a degree not characteristic of either the 1837 and especially the 1842 negotiations. Thereby they avoided removal westward and concentration upon one or two reservations, and they achieved their aims of remaining within their band territories and of having guaranteed them reserved lands therein which could be occupied and developed without fear of preemption.

VII. The Economy of the LCO Reservation Based Community after 1855

Irrespective of the treaty rights the LCO band retained after the 1854 agreement, it is important to consider the available facts concerning their actual subsistence and economic patterns. For the purposes of this research it is important to know how or by what means they subsisted, and where they engaged in significant economic activities. This concluding inquiry, therefore, will concentrate on evidence concerning the weight or

importance of various aspects of the LCO band's economy after 1854, through the end of the nineteenth century, and into the twentieth century.

It is important, first, to note that the United States was neither prompt nor responsive in fulfilling all of the stipulations of the 1854 treaty due the LCO band. It was many years, for example, before the services of a blacksmith were actually made available on a regular basis to this band. Similarly, Article 9 of the treaty, calling for an investigation of past due payments under the 1837 and the 1842 treaties and the payment of any arrears, was not fulfilled even at the end of the century. Moreover, during the Civil War years the United States violated Article 4 of the treaty by insisting upon payment of annuities in much depreciated paper money rather than the silver and gold coin called for.

But more importantly, the LCO band was under constant pressure to abandon its claim to a reservation within area 242C and to migrate and resettle elsewhere. To be certain, the old removal program aimed at relocation west of the Mississippi River had died, but a new policy of attempting to have the Wisconsin Chippewa consolidate on one reservation – Bad River was the favored choice, continued actively in force. In 1863, under such pressure, one LCO chief with 29 followers did apparently temporarily move to Bad River, but they did not stay and none followed them. Occasionally, one or several self-styled "LCO chiefs" with extremely dubious credentials would show up in Washington responding to these blandishments, offering to sell the reservation for a reasonable consideration, but nothing ever came of such confidence tricks. These pressures to consolidate were

justified by American officials in various ways, but they actually represented efforts of enterprizing Wisconsin citizens to gain control of the LCO pine forests at the lowest possible cost. This pressure ended only in 1879, six years after the reservation had been fully and finally surveyed, and one year after the process of allotment had begun. What had happened was that in 1872 the United States Congress had passed legislation calling for the sale of the reservation on the open market – with the permission of the LCO band. When the band rejected the proposal, the reservation was promptly surveyed so that allotment could begin, thereby providing a mechanism for the sale to loggers of LCO timber (21:1-2; 24; 52; 27:301; 30; 33:39, 428, 431; 36:18-19, 87; 43:162; 166; 167; 191; 193; 194; 205).

Throughout the late 1850s and early 1860s the LCO band was also under a different and contrasting kind of pressure, to settle upon its reservation. The LCO responded by complaining that no blacksmith or other services had been provided, that the reservation had never been surveyed, and that the lands they desired were constantly subject to trespass, particularly so by loggers who were busy cutting and removing prime timber from their lands. And they demanded that the reservation be surveyed and protected from these "pine thieves." Except for protection of this wealth in standing pine timber, there was, as contemporary agents observed, very little incentive for the LCO band to settle on their reservation. All reports portray them as completely involved in their traditional economic activities, hunting and gathering throughout their old estate, fully engaged

in their seasonal round, and increasingly drawn to American settlements and lumber establishments in the lower Chippewa valley, where, as we will see, new economic opportunities were rapidly coming available to them. However, in response to pressures to settle on the reservation they sometimes promised to do so; but as Agent Webb observed in 1863, "the promise is soon forgotten in the excitement of the hunt" (22:46; 23:731; 27:300-301; 33:432; 163).

The first survey of the exterior boundaries of an LCO reservation was conducted in 1863, but as it turned out the following year much of the area included had already been placed on the market and prempted by Americans, and extensive logging operations thereon had begun. Over the next decade there was considerable confusion and conflict over who owned and controlled the lands in this "reservation," with loggers working part of the area and some LCO bitterly resisting this invasion and harassing them, with all parties complaining to various levels of government. This situation was not resolved until 1873, when the present reservation in Sawyer county was finally surveyed, whereupon the process of allotments began. As indicated, this process introduced a convenient and systematic means for logging firms to gain access to LCO pine timber at very low cost, and a modest source of income for one group of LCO band members after another over the next sixteen years, thereby eliminating the basis for the earlier conflict.

It is evident from contemporaneous testimony, as well as from inspection of the geography of the reservation boundaries selected (in which selection the LCO chiefs had a hand), that they had included what they

considered the most valuable tracts in the region. These included, in addition to extensive pine and hardwood forests, the sites of some of their old summer villages – which represented the first settlements of the Lake Superior Chippewa in the interior of Wisconsin, and the maximum amount of wet-lands, cedar brakes, maple sugar groves, and wild rice lakes. In effect, the LCO band had selected as its reservation the most valuable base-of-operations for a traditional economy, the best sites for its summer villages, the lushest source of fall, winter and early spring foods, and a source of income from the forests. However, at the time of the final 1873 survey the LCO band was not entirely satisfied, for some of the most valuable maple sugar groves and wild rice lakes had been excluded by the surveyor (31:379; 33:430-32; 42:147; 192; 195; 196; 197; 202).

As finally surveyed the LCO reservation contained a total of 77,842 acres, including 66,136 dry land acres that were subject to allotment and 11,706 acres in wet lands that were never alloted. The process of allotment began in 1878 and ended almost thirty years later in 1906, in which year the last 112 patents were delivered. At that time a total of 1003 LCO band members had received patented allotments to 57,746 acres, averaging 57.6 acres per allotment, considerably less than the 80 acres provided for in the 1854 treaty. In 1908 there remained unalloted a total of 20,096 acreas, including 8390 in dry lands. At this point we should note that the total of dry and wetlands in the LCO reservation provided only an average of 62 acres, or about 1/10th of of a square mile, for each of the estimated

1250 LCO Chippewa based on this reservation during the second half of the nineteenth century (see below for population estimates). As noted earlier, the traditional LCO band economy required from eight to twelve square miles for their subsistence, and we may observe that it was, therefore, entirely impossible for the LCO band to sustain itself by confining its subsistence activities to the assigned reservation in these and later decades (70:396; 72:163; 42:147; 43:164; 44:172; 46:174; 47:159; 48:180; 54:238; 60:330; 62:319; 68:374; 73:141, 147; 184).

As might be expected, when the LCO band established its summer villages on the reservation after 1873 it did so following traditional designs. Their households were not scattered about the reservation on the allotment, much to the consternation of their agents, for even when "permanent" log structures were constructed by or for them these were located in several compact villages. Indeed, the strong impression this researcher has from the evidence is that the LCO people long treated these allotments, not so much as private property following American cultural patterns, but as a special kind of traditional Chippewa usufrucht insisted up on by Americans and sanctioned by their own leaders. Moreover, throughout the last half of the nineteenth century it is clear that the LCO band never, as a whole or even as a majority, confined itself exclusively to this reservation. From 1855 well into the twentieth century they are regularly and consistently reported as roving over most of their old band territory as well as other parts of Wisconsin, hunting, trapping, berrying, trading, selling, working, and engaging in varied other economic pursuits. From time to time, because of special economic inducements, such as

the logging boom era, more LCO members lived on or nearby the reservation, but whenever these opportunities faded they sought their subsistence elsewhere. One report for 1869 even has them reversing their seasonal round, that is, spending the winter months on the reservation rather than hunting and trapping in the region to the south thereof. But this was apparently a temporary phenomena, occasioned by economic opportunities associated with nearby logging operations. It was not until 1892 that as many as half of the LCO population and other Wisconsin Chippewa were reported as remaining more or less "permanently" on their reservations (21:27; 25:75; 26:90; 33:38; 36:87; 41:205; 43:162; 54:237-39; 55:466, 473; 58:333; 63:372; 90:217; 163; 169; 172:109, 169; 137:276-77; 175:44; 176:182; 183:185-87).

Estimating the LCO band population during the second half of the nineteenth century and into the twentieth century poses a problem. The reported numbers range from a low of some 739 in 1839 to a high of about 1278 in 1889 and then 1379 in 1908. Changes in the figures documented from year to year clearly do not represent natural increases or decreases. The numbers available do not generally represent a proper or accurate census. Instead, they are enumerations of the LCO band members who showed up for annuity payments, those known to be associated with the band or reservation (not necessarily "living" there), those whom an Agency farmer could identify, and so on. In the last quarter of the nineteenth century the sub-totals by age and sex *never* add to the same grand totals reported for the LCO band, while the agents always failed to enumerate the number of small

children from birth to five years of age. Finally, as the Agents themselves reported, sharp increases of 100 or 200 from year to year do not represent natural population growth or decline, but instead temporary migrations to or away from the reservation in response to economic conditions. Similarly, the Agents reports seem to represent the seasonal maximal population, in early fall, and do not take note of seasonal variations at all, except for occasional reports that the reservation was nearly entirely deserted much of the year. However, for the purpose of calculating per capita income from various sources, per capita acreage, and gross nutritional requirements of the LCO population, I use an average total figure of 1250 LCO band members broken down into the following age-sex categories and sub-totals: 150 small children through five years, 150 school-age children 6 through 16 years, 450 adultsmales 17 years and older, and 500 adult females 17 years and older (3:488; 5:332; 14:5; 26:90; 31:376; 38:28; 44:171-72; 46:174; 47:157; 48:180; 50:255; 51:229; 52; 53; 54:237; 55:470; 56:515; 57:345; 58:331; 59:329; 60:325; 61:308; 62:315; 63:369-70; 64:407; 65:401; 66:374; 67:349; 68:372; 69:374; 70:393; 72:186; 73:147).

We can calculate the LCO band annuity income after 1854 derived from the 1837, 1842, and 1854 treaties using the totals in coin and goods provided for in these treaties and the figure of 5,000 eligible Chippewa that was generally employed by the agent for this same purpose. Under the 1837 treaty the Chippewa were awarded $28,500 in coin and goods, or a per capita income of $5.70; under the 1842 treaty they were due $25,000 in coin and goods, or $5.00 per capita; and under the 1854 treaty they were supposed to receive $13,000 in coin and goods, or $2.60

per capita. Moreover, the 1837 annuities expired in 1858, those of 1842 in 1868, and the 1854 annuities ended in 1875. Therefore, the LCO band was *eligible* for the following total annuity payments in the periods indicated:

1855-1858: $13.30 per capita or a total annuity income for a family of six amounting to $79.80 per annum.

1859-1860: $7.60 per capita or a total annuity income for a family of six amounting to $45.60 per annum.

1869-1875: $2.60 per capita or a total annuity income for a family of six amounting to $15.60 per annum.

However, the annuities due were never delivered equitably as these figures may suggest, so that the average annual per capita income of the LCO band was almost always considerably lower than these figures. The reasons for this included the remoteness of this band from the points where annuities were distributed, the fact that annuities were only delivered to those who actually showed up at the distribution points, and the fact that the annuity pay and goods were near invariably delivered far to late in the season – in late September, October, or November, to do the LCO band any good. As the Agents regularly reported in their and the Chippewas' complaints about these delays, for the LCO band to travel to the distribution point after September 1st meant that they would lose their valuable wild rice harvest and much delay their critically important winter hunt. The agents reported that as few as one-third and not many more than one-half of the interior Chippewa, including the LCO

band, ever received their annuities on any sort of a regular basis. Especially after 1858, as indicated by the agents, the actual cost of traveling from the interior to receive annuities was greater than the small value received, not counting the great hazards of travel late in the season and the considerable benefits lost from the wild rice harvest and hunting. Finally, because these income figures do not mean much in the abstract, we may note that in the same period that an LCO family of six was eligible for $45.60 and later $15.60 in annuity income, the agents reported that they could not hire agency farmers at the low very $600 per annum salary available, while in the same period a long service agency blacksmith reported he had to resign because he could not subsist his family on $600 per annum. Therefore, even during the best years, between 1855 and 1858, the annuity income from these three treaties never provided more than a very small supplement to the LCO band's economy, replacing for a time some of the income lost through the temporary decline in commercial hunting and trapping, while in many years from one-half to two-thirds of the LCO families never received annuities at all (3:484-85; 4:334; 5:332; 12; 13:209, 211-12; 14:52; 17:303; 20:30; 22:22; 28:41, 49; 31:343, 379; 33:428; 34:34; 43:162; 44:171; 86:990; 122; 165; 201).

At that time when the LCO band's annuity income came to an end its members had begun receiving a modest income from the logging industry. This income came from three sources: from stumpage fees paid to the owners of allotments, from wages received by LCO men for employment in the logging and milling industries, and from sales by LCO band members of game, wild rice,

berries, and other natural products to logging camps and other customers. I will discuss LCO income from stumpage fees and wages first, observing initially that it must be emphasized that stumpage fees were paid to *individual* owners of allotments, not to the band as a whole. While we may safely assume that the strong Chippewa value of egalitarianism and their ingrained emphasis upon reciprocal sharing likely resulted in the distribution of significant portions of this income on a wider basis, outside the temporarily wealthy households, we should also appreciate that the system of delivering stumpage fees to a few LCO members annually and not others was likely a source of some strain.

Apparently, even before the first federally approved contracts for logging on the reservation some band members had been drawn into temporary, seasonal employment in the industry in areas south of the reservation. Exactly how many were so employed is unknown. Similarly, unknown is the number of LCO band members later employed in logging and allied work on their own reservation or in adjacent locations, nor do we have any figures available on the gross annual income received from these sources. However, it must have been a very important supplement to the band's economy, especially during the brief period of the logging boom on the reservation proper (when they enjoyed preferential employment rights under law). What we have in the way of evidence consists of generalized reports that many or most LCO men were so employed part of the year for brief time spans. In any respect, well before 1873 some LCO men were already employed as packers for surveyors, in transporting supplies, as log drivers in the

spring, and as fallers, while others were cutting cordwood and performing similar chores for pay. Indeed, first-hand observation of their success in such employment moved a temporary OIA employee, David Day, to fashion a genuinely sophisticated economic development plan for the LCO and other Chippewa. He pointed out in his analysis that they were not agriculturists, which was to them "Squaws work" they would do little of. He indicated that the failure of agricultural development plans had been due to the fact that "we always insist that he must be a *farmer*, while to his mind this is the very thing he don't want to do." He noted the high order of logging skills many interior Wisconsin Chippewa had already developed and argued that these should be encouraged on an organized basis, with a development scheme centered upon a "mutual association plan" (i.e., an LCO band cooperative logging enterprise), with the LCO men cutting, driving, and selling their own logs, and engaged in similar productive activities such as cutting hemlock bark and producing extract for the tanning industry. Unfortunately, the COIA gave no attention to this design. Similarly, a few years later the COIA rejected out of hand the LCO band's own plan to build dams to facilitate log driving and to charge tolls to the loggers for this service (192; 204).

Instead, the COIA approved the first outside logging contract, which in 1874 yielded a gross income of $10,000, for which sum the contractor cut and removed 14 million board feet of virgin board timber before canceling his contract. In their first experience with government supervised logging, therefore, the LCO received 7/1000ths of one cent per board foot, which must have been one of the

best timber bargains of the century. The rate per board foot increased somewhat in subsequent years and the logging of LCO pine forests reached a peak between 1884 and 1888, which was quickly followed by the severe local depression of 1890 after the COIA temporarily ended logging on the reservation. By that time nearly all of the prime pine timber had been cut, while the logging of hardwoods was delayed until 1904 due to the lack of accessible railroad transportation, needed because the hardwood logs could not be rafted downstream to the mills. Unfortunately, income from stumpage fees paid the LCO band was not regularly reported in the ARCOIA. For some years between 1873 and 1899 we have no figures at all. However, for the years that such facts was reported we can calculate the following levels of income from stumpage payments:

1874: The first year of contract logging produced a total of $10,000 in stumpage income, or $8 per capita and $48 per family of six per annum.

1887: The best, and nearly the last year of major pine logging, produced a total of $472,672 in stumpage income, or $362 per capita, and $2172 for a family of six per annum.

1893: A low point in pine logging following the depression of 1889-1891, produced a total of $1025 in stumpage income, or $0.82 per capita, and $4.92 for a family of six per annum.

Unfortunately, income earned by the LCO band from employment with logging firms on and off the reservation was never reported by the agents except in the most

general terms. In 1882, for instance, many LCO men are reported as temporarily employed in the woods, bringing home at the end of the season a "surplus" of from $75 to $150 each. The "surplus" was over and beyond what these men had drawn during the winter's work, on which we have no information at all. However, it is very evident that over the course of the pine logging enterprise on the LCO reservation, between 1874 and 1897, the band obtained reasonably substantial income from both stumpage payments and from income earned while employed in the industry, while for a few peak years, between 1884 and 1888, they enjoyed a short period of very considerable prosperity relative to the income levels before 1874 and after 1890 (38:26-27; 39:372-73; 40:148-49; 42:142; 44:171-74; 45:180; 46:175; 47:159; 48:180; 51:229; 55:470; 56:516; 57:348-49; 58:333; 59:331-32; 60:328; 61:309-10; 62; 63:374-75; 64:410; 67:352; 68:376; 69:377; 176:181; 206).

Again, these figures do not mean a great deal except when compared against incomes for others in the area, cost of living estimates, and other factors. One such factor consists of the fact that after 1875 the OIA continued to pay the LCO band small amounts in goods and rations annually, which in 1880 was converted into a kind of "work-fare," with able-bodied adults required to perform labor for these "payments." In this same period the agent began collecting and banking the stumpage income of some aged LCO band members, as well as that of other "incompetents," which he then doled out to them in average weekly payments of $7.50, or $390 per year per capita, stretching out this one-time infusion of income over the course of three or four years. That is, the agents were estimating the basic cost of living for an adult as

about $390 per year, which would make a cost of living estimate for a family of six approximately $2340. However, the best estimate of the cost of living – on a bare subsistence basis, comes from the agent's own calculations of the minimal cost of feeding and clothing the LCO population during the 1890 depression year, when there was actual starvation on the reservation.

The federal legislation for the relief of the LCO and other Chippewa that year gave the cost of subsistence food for them as $0.78 per day. This totals to $286 per capita and $1716 for a family of six per year in 1890 for basic food, a figure comparable to the amounts doled out to the elderly from their stumpage income. With these comparisons in hand we may judge that, except for a period of some four to six years prosperity during the 1880s, the LCO bano did not receive nearly sufficient stumpage income to provide it a bare subsistence. Income from wage work obviously supplemented that received from stumpage payments, but this would have peaked during the same years that the latter were the highest. Nonetheless, year after year large numbers of able-bodied and incapcitated LCO Chippewa received "workfare" and similar "payments" from the OIA. In 1883, for example, which was a peak year for both stumpage and logging income, 841 LCO members received such payments, while in 1884 1,041 did so. That is, in spite of the highest incomes ever received from the logging boom, very large numbers of LCO members were still so poor that the OIA had to dole out rations to them part of the year (44:171; 174; 45:186; 47:159; 48:180; 51:255-56; 109).

The agents employed these "workfare" payments as incentives for the development of American style agriculture on the reservation, for the men and women so employed mainly worked at clearing land for "farms." Through the second half of the nineteenth century agricultural development remained one emphasis of the OIA, if not of the LCO band members. In the early years, until intensive logging was underway, extensive farming was entirely impossible because of the dense forest cover and the very high cost of clearing land. Hence any increase in farm acreage was largely a by-product of clear-cutting the forests and the endemic forest fires that were one consequence thereof, which left some partially cleared parcels in their train. Still, Chippewa values, skills, and dispositions, the very short growing season, and the woefully inadequate developmental in-puts prevented any considerable agricultural development.

The first clear records for farming activity and productivity are for 1868, when the agency farmer had 100 acres under cultivation and the LCO members 115 (or 0.09 acres per capita). Thereafter, the agents often reported slight increases in the number of acres tilled until about 1896, when 750 acres were reported as under cultivation, with an additional 250 acres freshly cleared. At this time the LCO band also owned 110 horses, 9 yokes of oxen, 141 other cattle, and 125 hogs. However, it is very clear, as the agents regularly pointed out, that this "farming" was almost entirely done by the agency farmer, missionaries, and the LCO band's women and children. That is, what agricultural development occurred on the LCO reservation followed traditional Chippewa practices of small-garden patches cultivated by women

and children using hand tools and human muscle power. Indeed, these agents also reported regularly that the annual LCO production of game, wild rice, maple sugar, berries, and other natural foods far exceeded any "agricultural" – properly, horticultural, production. As late as 1912, for instance, only 600 acres were being "farmed" in this fashion. In 1912 the largest such "farm" was thirty acres; and the average size of the plots cultivated by the Chippewa was approximately 0.3 acre. That year the LCO produced only $5.41 per capita in agricultural products. In summary, through the last half of the nineteenth century and well into the twentieth there was no significant agricultural development on the LCO reservation: such foods as were grown by this population came almost entirely from women working very small garden plots (24:52; 27:300; 117:2; 31:377-78; 33:431; 35:603; 38; 39; 43:163; 44; 46:175; 48:180; 51:229; 53:304; 54:237; 56:517; 60:331; 62; 63:373; 64:409; 65:404; 66:377; 67:355; 68:375; 184:124, 140-41, 146; 186:123; 111).

The nutritional value of the farm and garden products of the LCO reservation can be calculated as a means of estimating the importance of these to the LCO subsistence economy. Using the population figures and age-sex breakdowns given above and standard nutritional reference works, we can also estimate the basic caloric requirements of this population (for a simple maintainance diet). These total to 2.7 million calories per day, or 985.5 million calories per year for the LCO population, simply to sustain life. It happens that by far the *best* year for the production of foods from farms and gardens on the reservation during the nineteenth century was 1900. That year there was reported grown on the reservation

1500 bushels of oats, 600 of corn, 1500 of potatoes, 300 of turnips, 200 of onions, 150 of beans, 6000 of pumpkins, and 450 bushels of other vegetables. Again, using standard nutritional reference works we can calculate the total available food calories derived from this production. These total some 206 million calories.

Thus, with a total population requiring 2.7 million calories per day to avoid starvation, in 1900 was produced on the reservation enough food to feed the population approximately 76 days. And even this is a generous over-estimate, since it assumes that all foods grown were made available exclusively to the LCO population, which they were not. Part was consumed by agency personnel and part sold by the agency farmer to enhance his low income. Part was sold or bartered by the LCO themselves to others; and part was consumed by the several hundred oxen, swine, cattle, and horses that the LCO then owned. Therefore, it is doubtful that in 1900, the best year of LCO agricultural productivity, that sufficient food was grown on the reservation to feed the population more than 60 days. Obviously, much less in the way of farm products were available to the LCO people in earlier decades. Moreover, it will be obvious that the foods grown were grossly lacking in vital nutrients, particularly so animal protein and amin cids (64:409; 207; 208; 209; 210).

Before considering the extensive direct and indirect evidence for LCO off-reservation hunting and allied traditional economic activities, we need to dispense with any question concerning the adequacy of the fish and game supply on the LCO reservation proper. In brief, this area was entirely too small to subsist a hunting and gathering population the size of the LCO band. The some

122 square miles that make up the reservation may have supported a very small Chippewa village, but not a population of 1250. In any regard, the game on the reservation had disappeared before 1892, while the lakes were largely fished out before 1893, in which year the agent recommended a restocking program (56:511; 57:347).

In 1880, commenting on the very low state of the local subsistence economy caused by bad weather in Wisconsin, and the prospects for their survival, Agent S.E. Mahan observed, "What the Indians will do is a mystery." There was no mystery to the LCO survival strategy. They continued doing as they had for centuries earlier and decades afterwards. Supplementing the meager fare available from stumpage income, work in the logging industry, "work-fare," farm products, and other American originated economic activities, they continued to forage over their band territory hunting, gathering, and fishing. They especially hunted the Virginia deer for both consumption and commercial purposes. For an unanticipated consequence of American agricultural development and logging in the areas south of and surrounding the reservation had been a dramatic increase in the size and distribution of Wisconsin's deer herds. It happened that the White-Tailed deer was the one large North American game mammal that was able to adapt very well to agricultural and other development activities. Hence the planting of fields, the clearing of pasture lands, and the cutting of the forests had provided much larger areas of ideal browse for this game animal, with the consequence that they began multiplying rapidly in the 1840s (44:175; 80).

Beginning with a low-point about 1830 Wisconsin's deer populations increased rapidly until they reached a peak about 1885, when extensive professional and commercial over-hunting started a sharp decline. Beginning in the 1840s, with the logging camps and mills in or near the southern part of Area 242C as their first prime market, an extensive traffic in venison developed from the deer herds in central and northern Wisconsin. In 1856, for instance, professional hunters could sell all the venison they could deliver to markets in Eau Clair county for prices ranging from $5 a carcass to 18 to 25¢ per pound; but the most important markets were distant cities, including Milwaukee, Chicago and New York, whence venison was shipped by rail. In the same period, professional hunters were paid $40 per month, plus board and ammunition, and the occasional bear carcass and pelt brought from $30 to $50 (80; 90:273; 170:255-56; 180:215; 183:185-87).

Almost every year, from the 1840s through the end of the century, the Indian agents regularly reported that the LCO and neighboring Chippewa bands did not confine themselves to their reservations but in fact continued to "rove" over mo of central and northern Wisconsin engaged in their traditional economic activities. Annually as well, the reservation teachers and the agents complained that the LCO parents seasonally took their children from school with them on hunting, berrying, maple sugar extracting, and fishing expeditions, resulting in an annual daily attendence of about one-third to one-half of the number of children enrolled. Indeed, this family subsistence-foraging pattern was the major motivation for

the opening of the Hayward Indian boarding school in 1902 and the closing of the reservation day schools.

The primary focus of LCO deer hunting continued to be the southern portions of Area 242C, encouraged by the rapid growth of the deer herds there and the end of warfare with the Sioux. Before 1855 they could not have hunted this areaon with the security, or the rate of success that they enjoyed in later years. LCO reliance on traditional hunting, trapping, and gathering throughout the band estate seems to have been near total until about 1880, and it apparently declined slightly until that time along with the growth of alternative economic opportunities associated with the logging industry. After the 1880s the LCO were increasingly involved in a more mixed economy, with partial and sometimes very substantial dependence upon income from employment and stumpage income. Overall, we can see from the evidence that this band never came close to abandoning substantial reliance on hunting and foraging in its old territory, although some band members became more specialized and were occupied on more of a full time basis in the American economy. Hence, although the importance of off reservation hunting may have varied from year to year, declining during periods of high income from the logging industry, and increasing again when these sources of subsistence vanished, at no time during the second half of the nineteenth century did these Chippewa not derive a very substantial portion of their subsistence and income from off-reservation hunting and gathering (21:27; 26:90; 27:301; 28:418; 31:24; 33:38, 427, 432; 34:309; 36:87; 176:180-182; 41:205; 43:162; 44:172; 46:175; 54:237-40; 55:471; 58:333; 60:331; 62:316, 320; 63:372;

66:329; 69:376; 70:393-94; 75; 90:217; 110; 112:2; 163; 169; 172:109, 169; 173:276-77; 175:44; 183:185-87).

Finally, it is quite clear from the evidence that the LCO band continued its off-reservation subsistence and commercial hunting with the full knowledge and recognition of their Indian agents. Moreover, these patterns continued without systematic interference from Wisconsin state authorities until 1898, when Wisconsin first attempted to enforce its fish and game regulations against the LCO Chippewa. That year the agent commented on this interference in the right of the LCO Chippewa to hunt in their band territory with the remark that it was "felt by the Indians to be a great hardship," adding that, "they have learned by severe experience the law must be obeyed." Unfortunately, those federal authorities most responsible for the welfare of the Chippewa in their charge by that date were either unaware of the hunting, fishing, and gathering rights claimed by these bands under their treaties, or they ignored their responsibilities for defending these rights. Meanwhile, the LCO Chippewa, who had few other means of subsistence readily available to them, continued to exercise their traditional economic skills and strategies. Had they not done so clearly they would have starved (62:320).

Conclusions:

1. The LCO band selected as its reservation under the 1854 treaty an area providing them with excellent sites for their summer villages, a good supply of natural foods that were part of the fall and late winter subsistence

economy (wild rice, maple sugar, fish), and large stands of soft- and hardwood forests.

2. This reservation provided only 62 acres per capita for the LCO population, far too little land area to sustain the population had it been concentrated on the reservation and had it confined its subsistence and other economic activities to that land area.

3. Throughout the second half of the nineteenth century and well into the twentieth the LCO band did not in fact confine its subsistence and other economic activities to the reservation. Instead, they "roved" over the traditional estate, area 242C, as well as adjacent areas, hunting, foraging, and occupied in other subsistence and income producing work.

4. The annuity income derived from the 1837, 1842, and 1854 treaties, which ended, respectively, in 1858, 1868, and 1875, never provided more than a small supplement to the LCO band economy, for the reasons of the small size of the payments to begin, and the fact that most LCO band members never received even these modest increments to their economy.

5. During the two decades of pine logging operations on the LCO reservation individual LCO band members received modest stumpage payments for one or a few years each. Generally, these provided the individuals and families receiving them sufficient income to subsist for a four or fewer years, although between 1884 and 1888 the stumpage income received was considerably more than this. However, this was a one-time infusion of income received over a very brief period of time.

6. Before, during, and after the logging boom on the LCO reservation, numerous LCO men were employed temporarily and seasonally in the logging and allied industries, which provided additional income that likely peaked in the same years as did stumpage income, between 1884 and 1888. These years, then, represent the high point of the LCO band prosperity, and they were followed in 1890 by acute economic depression necessitating emergency relief measures to prevent starvation.

7. Combined, income from both stumpage fees and wage-work over this entire period was not sufficient to provide a bare subsistence for the entire band throughout the year. Even in two peak income years, 1883 and 1884, from 841 to 1041 of the 1250 band members had to be issued rations by their agent in periods of seasonal want.

8. Reports of so-called "agricultural" development on the LCO band reservation turn out to be bureaucratically exaggerated portrayals of traditional LCO gardening practices. As late as 1912 the average size "farm" was only 0.3 acres per capita.

9. At the peak of their "agricultural" productivity during the nineteenth century, in the year 1900, sufficient food was produced on the LCO reservation to feed the population a minimum maintainance diet of vegetable foods for approximately 60 days, and that diet was very deficient in vital nutrients, especially animal protein.

10. The LCO reservation proper provided quite inadequate means for rectifying these nutritional deficiencies: its game had disappeared before 1892, and its lakes were fished out before 1893.

11. The development of farms and the clear cutting of forested regions caused a vast increase in Wisconsin's deer herds that began in the 1840s and reached a peak about 1885. In consequence, a very extensive and lucrative traffic in venison and hides developed, with professional hunters supplying both nearby markets and distant ones huge quantities of both.

12. The LCO band's hunters participated actively and extensively in this commercial hunting, as well as hunting off reservation for subsistence purposes. They continued to hunt off reservation for both subsistence and commercial purposes until the end of the century and into the next, although the amount and importance of such activity varied with the availability and attractiveness of other economic opportunities.

13. Had the LCO band not continued to engage in off-reservation hunting and foraging after 1855, and especially after 1873, they would have starved in almost all years, since their total annual income from all other sources, and the foods naturally available or produced on the reservation, were quite inadequate to their needs.

14. This off reservation economic strategy continued with the full knowledge of responsible federal authorities, while the state of Wisconsin did not systematically interfere with the pattern until 1898. This interference at that date is probably associated with state efforts to control the depletion of the deer herds caused by extensive commercial over-hunting, safe-guarding them as a recreational resource at a time when northern Wisconsin was beginning to develop as a tourist, summer home, and fall hunting attraction.

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Although not all of the following documents are specifically cited in the text, they were used in forming the narrative portions of this report as well as the conclusions.

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Portions Of August 26, 1995, Affidavit Of James A. Clifton, Ph.D., Landowners' Expert Ethno-Historian.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Mille Lacs Band of Chippewa Indians, Arthur Gabow, Walter Sutton, Carleen Benjamin, and Joseph Dunkley,	)	Civil No. 3-94-1226
Plaintiffs,	)	Judge Michael J. Davis
United States of America,	)	Magistrate-Judge Jonathan G. Lebedoff
Plantiff [sic]-Intervenor,	)	
St. Croix Chippewa Indians, et al. Lac du Flambeau Band, et al. Bad River Band of Lake Superior, et al. Lac Courte Oreilles Indians, et al. Sokaogan Chippewa Community, et al. Red Cliff Band of Lake Superior, et al.	)	**AFFIDAVIT OF JAMES A. CLIFTON, Ph.D.**
Plantiff [sic]-Intervenors,	)	
vs.	)	
State of Minnesota, Minnesota Department of Natural Resources, and Ron Sando, Commissioner of Natural Resources	)	
Defendants	)	
County of Aitkin, Benton, et. al., John W. Thompson, et al.,	)	
Defendant-Intervenors,	)	
Save Lake Mille Lacs Association,	)	
Amicus Curiae.	)	

I, Dr. James A. Clifton, being duly sworn, do hereby state as follows:

1. I am the Scholar-in-Residence of the Department of Anthropology at Western Michigan University. In 1990, I retired from my former position as Frankenthal Professor of Anthropology and History at the University of Wisconsin in Green Bay. Over the past thirty-six years, my scholarly specialties have emphasized contemporary community (ethnographic) studies and longitudinal and historical (ethnohistorical) studies of the native peoples of the Northeast, especially so those of the Western Great Lakes-Ohio Valley region, including the Chippewa. In my basic academic research and writings, I have concentrated on the patterns of interactions and communication between the Indians of the region and the French, British, and Americans. My research has been concerned especially with Indian adaptations to efforts of European-American governments to introduce their policies and institutions in the region. One salient focus of my scholarly work has been the detailed study of the negotiation, and the consequences, of numerous treaties between the United States and various Indian groups, including the Chippewa. To further that research, I have developed an extensive computerized database consisting of an analytic classification of numerous salient features of all 364 ratified Indian treaties. For nearly three decades, as well, I was a Fellow of the Society for Applied Anthropology, involved in efforts to apply anthropological methods and knowledge to the solution of practical problems. For example, for five years I was director of a federally sponsored ACTION (a university based VISTA) program,

organized to aid impoverished Wisconsin groups – including Indian communities (mostly Chippewa) – in coping with various problems then facing them. Another example of my applied work has been extensive consulting with the federal government, various recognized Indian tribes and unrecognized Indian groups, and several state governments, for the most part responsibilities as research consultant and expert witness in federal and (infrequently) state court cases. As set forth more fully in the resume attached as Exhibit 1 to this Affidavit, I have published a good many books, monographs, and essays reporting on my scholarly research, including several works dealing expressly with United States Indian treaties. I have been retained as an expert ethnohistorical witness by Persian, MacGregor, and Thompson, on behalf of the six landowners who are defendants in the above captioned litigation. In that capacity, I have mainly reviewed my earlier research and writing bearing on the pertinent treaties with the Wisconsin-Minnesota Chippewa bands, and incorporated some parts of my other research concerning ratified Indian treaties, generally. So, the following statements of fact and opinion are based largely on my prior, independent scholarly knowledge of certain matters at issue in this litigation.

2. In Article 1 of the Treaty of July 29, 1837 (7 Stat., 536) with thirteen signatory Chippewa bands then residing within their several band territories in northern Wisconsin and Minnesota, the United States obtained a cession of all the rights of these Indians to a large tract of land, comprising what is now identified as Royce Area 242. These rights consisted of the thirteen bands' "Indian title," which had been formally recognized by the United

States in three earlier treaties between 1825 and 1827. Their recognized Indian title before the 1837 treaty had consisted of the exclusive right of occupation and usufrucht [sic] to the separate band territories comprising Royce Area 242, as well as other as yet then unceded areas.

3. In fact, only some of the thirteen signatory bands were actual residents of Royce Area 242, the tract ceded, therein exercising their rights of exclusive occupation and usufrucht [sic]. That is, in Chippewa usage about land tenure, some of these bands "owned" the rights to band territories within Area 242 (e.g., the Lac Courte Oreille band), while others did not (e.g., the Leech Lake and LaPointe bands). The fact that thirteen Chippewa bands (including several from Wisconsin's Lake Superior shoreline and others from northern Minnesota) participated in the negotiation, signing, and benefits of this treaty represented the convergence of two separate factors. One such factor consisted of the initiative of the northern Minnesota bands, particularly at Leech Lake, who were the first to propose to American authorities negotiations for a cession of land. These audacious northern Minnesota bands predominated at the 1837 treaty's negotiations, and for many years benefited from its proceeds, although they did not habitually occupy or exploit the resources of Royce Area 242. During this treaty's negotiations, representatives of the Lake Superior shoreline bands disclaimed any special rights to the area then being ceded, but signed the treaty nonetheless. However, subsequently, the Lake Superior shoreline bands refused to accept annuity payments for the cession of neighboring bands' lands, which cannot be said for those Chippewa

bands of Northern Minnesota. The second contributing factor consisted of two concerns of the United States. The first of these consisted of the goal of obtaining an indisputable cession of the Chippewas' whole title to the area, leaving no possibility for some excluded bands later to protest that they had not agreed to the cession. The second aim was to provide places to whence, eventually, the bands actually occupying Royce Area 242 might migrate and resettle, once the area had been surveyed, placed on market, and the processes of conveying title to other parties and actual settlement had begun. The anticipated future destination for the immigration and resettlement of the interior Wisconsin bands, so far as American authorities were concerned, consisted of the remaining unceded parts of what these authorities conceived of as the "collective" Chippewa estate, i.e., the Lake Superior shore region and northern Minnesota. These unceded Chippewa band territories were north of the northernmost boundary of Area 242. Although implementation of the "Removal policy" was in full swing at the time with respect to other Indian groups east of the Mississippi River, the United States did not in this 1837 treaty even request that the interior Wisconsin bands formally stipulate to evacuation of the ceded area and resettlement elsewhere. On the contrary, American authorities confidently assumed that at some future time these bands would voluntarily emigrate, joining other Chippewa in unceded regions, after American settlement had commenced. For these several reasons, combined, the entity identified by the United States as empowered to negotiate a cession of Royce Area 242 was called "the Chippewa

nation of Indians." This was an entirely fictive construction. The concept of a "nation" with political-economic authority over all constituent bands was entirely alien to these Indians. Each Chippewa band was politically autonomous, and it was each separate band which held the exclusive rights of occupation and usufrucht [sic] to its own territory, commonly the watershed of an important stream. Other Chippewa bands had no right to exploit the territory of a resident band except when given permission – as guests, as visitors, or as allies. Hence, in advocating this treaty, if the northern Minnesota bands – eager to obtain annuity payments at no cost to themselves in lands lost – were less than scrupulous in respecting the independence and land-tenure rights of their Wisconsin Chippewa kinfolk, the United States erred on the side of caution, expediency, and inclusiveness, by allowing the northern Minnesota bands even to participate in and to benefit from this treaty of cession.

4. However, in Article 5 of this 1837 Chippewa treaty, the United States provided a mechanism for pressuring or requiring the Chippewa bands that actually occupied and exploited the resources of Royce Area 242 to evacuate these ceded lands, thence to resettle elsewhere, in unceded parts of other Chippewa bands' lands. In this article, the United States granted to these bands the temporary privilege of continuing, for some unspecified time, their "hunting, fishing, and gathering the wild rice, upon the lands, the rivers and lakes" of the ceded territory. This permission was made subject to a contingency, also expressly stipulated in Article 5. Continuity of the privilege was made conditional on continued permission of the Executive Branch of the United States

government. This limitation was expressed by the words, "during the pleasure of the President of the United States." In effect, thereby, both the Chippewa signatories and the United States Senate in this treaty article delegated to the President the sole, unilateral, unrestricted authority for determining when the Chippewas' continuing permissive occupation and exploitation Area 242 would be ended. In ratifying this treaty, the Senate placed no further condition or limitation on this categorical presidential prerogative. No such condition or limitation was authorized in the instructions to the 1837 treaty commissioners; and the records of this treaty's negotiations indicate that no such additional condition or limitation on this specific, unequivocal presidential power was verbally communicated to the Indian negotiators, except the one which will be examined below. Indeed, during this treaty's negotiations, when the Chippewas' spokesmen offered an alternative to the American proposal for the outright cession of all their rights to the whole area, indicating their willingness to part with that portion of Area 242 containing extensive pine forests but not the oak opening-prairielands and streams and lakes, reserving these specific tracts for their own occupation and use, or, alternatively, to lease the area for a sixty year period, these substitute proposals were firmly rejected. Thereupon, the American negotiators explained that no such partial cession was acceptable, nor were there to be any reservations, only the outright sale of all the Chippewas' rights to the whole area. There can be no doubt that these Chippewa negotiators at the time fully understood what was being asked of them, an outright sale of all their property rights to Royce Area 242, a cession qualified

only by the privilege of temporarily occupying and exploiting the area until, after "many years," the president unilaterally determined that the area was wanted for settlement and terminated this privilege. So at last, after these specifics concerning an outright sale and temporary usufrucht [sic] privileges had been repeatedly communicated, stressed and clarified for them, and after haggling over the best price they could obtain for this transaction and other details, the 1837 treaty was signed by these Chippewa negotiators on the basis of this shared understanding.

5. In recent years, the phrase in Article 5 concerning the continuity of rights of usufrucht [sic] only "during the pleasure of the president" has become contentious. Hence, some facts and observations concerning the various different ways used by the United States in setting limitations on the continuity of such rights in all Indian treaties are pertinent. Only in this way can this particular restriction be put into full historical context, and the exact intent and meaning of the phrase be explained. Of the 364 ratified Indian treaties negotiated by the United States, 272 (including the 1837 Chippewa agreement at issue in the above captioned lawsuit) involved the cession of Indian rights to their holdings. Of these 272 land cessions, fewer than half of them – 131 to be exact – also made some provision for continued Indian privileges of occupation and/or usufrucht [sic] in the whole or parts of the areas being ceded (again, including the 1837 Chippewa treaty). Invariably, the United States in these 131 treaties imposed some sort of limitation or restriction on the continuity of these privileges. These constraints were of five different types, and in several of these 131 treaties

more than one type of restriction was placed on continued occupation or exploitation of the ceded lands.

6. By far the most common type of limitation specified in such treaties was the stipulation of a term certain, after which period of time or (occasionally) a specific date the usufrucht [sic] privileges would automatically terminate. This period ranged from several months to, most often, one, two or three years. By far the longest such term certain restriction was that specified in the Blackfoot et al. treaty of October 17, 1855 (11 Stat., 657), Article 3 of which established a hunting territory to be used by several tribes in common for a period limited to ninety-nine years. A more typical example of a term certain treaty, with a neighboring Wisconsin tribe in the same period as that of the Chippewas' in 1837, is the Menomini treaty of September 3, 1836 (7 Stat., 506). Article 4 of this treaty expressly provided that the Menomini would evacuate the area ceded within one year from the treaty's ratification. Manifestly, the 1837 Chippewa treaty did not place a time certain restriction on their continued usufrucht [sic] privileges.

7. The next most frequent type of restriction on continuity of such privileges imposed an explicit set of conditions for their cessation. Easily the most common of these limiting conditions indicated that the Indians were to be allowed continued use of the ceded lands, or portions of them, only so long as they "remained the property of the United States." That is, once the United States had conveyed parts or all of the ceded tracts to other parties, the rights of the Indians to exploit the resources

of such "sold" tracts would automatically cease. Sometimes, other types of "conditional" limitations were stipulated, instead. One common restriction allowed the Indians to continue hunting over an area for so long as there was enough game to justify this mode of subsistence. Another, less common stipulation for continuity of usufrucht [sic] privileges specified explicitly that the Indians might continue to exploit a ceded area so long as they conducted themselves peacefully with citizens and other Indian communities. Clearly, the 1837 Chippewa treaty stipulated no such explicit conditions for terminating their privileges of continued usufrucht [sic] of Royce Area 242. Specifically, their continued "good behavior" as a condition for continuity of these privileges was neither included in this treaty, nor was such a caveat so much as mentioned in the instructions for it, the actual negotiations, or the reports concerning it. There is no reliable, authentic contemporaneous evidence to indicate that during negotiations of the 1837 treaty, these Chippewa were promised that they would be allowed to continue hunting and fishing in the ceded area so long as they behaved themselves; nor is there any such evidence to suggest that at that time these Chippewa had somehow on their own reached such a misapprehension. An example of the numerous treaties where the condition limiting continuity of Indian usufrucht [sic] on ceded lands to tracts so long as they remained the "property of the United States" is the treaty with the Potawatomi of the Prairie and Kankakee of October 20, 1832 (7 Stat., 378). Indian treaties where the United States imposed a different condition for such continued use rights on ceded lands, one consisting

of maintaining the peace, in contrast, are quite uncommon. There are only ten such treaties; and with one exception they are sharply limited both by time period and geographic region. There were two such treaties (both in the Ohio Valley) requiring Indians to keep the peace with citizens in the years before the War of 1812, and seven such treaties (all in the far west) in the years after the Civil War, just before the American Indian treaty era ended. In only one Great Lakes-Ohio Valley area treaty was such a proviso included, during the intervening years. This was the February 8, 1831 compact with the Menomini (7 Stat., 342). Article 6 of this 1831 treaty allowed the Menomini to continue hunting and fishing in part of the area subject to two different limitations or restrictions. One of these was that this privilege would terminate when the ceded area was surveyed and offered for sale; and the second required the Menomini, meanwhile, to conduct themselves in a peaceful and orderly manner. A more typical example of such a "keep the peace" stipulation is found in Article 11 of the April 29, 1868 treaty with the Sioux, et al. (15 Stat., 365). Briefly, in historical perspective, the United States imposed a condition of maintaining the peace as a requirement of continued usufrucht [sic] of ceded lands only when there had been extensive warfare or frequent depredations committed by the Indians involved, affecting American citizens immediately before the treaty's negotiations, and only then in unusual instances. Such stipulations were nearly non-existent in the period between 1806 and 1866, especially so in the Great Lakes-Ohio Valley region during these years (the 1831 Menomini treaty being the sole

exception). Such conditions of Indian warfare or extensive depredations did not obtain in northern Wisconsin with respect to the Chippewa bands in 1837, so the issue of their "keeping the peace" was not so much as raised as a restriction on their continuing usufrucht [sic] rights.

8. In thirteen treaties, the United States set what may be called a "Permissive" limitation on continuing occupation and/or usufrucht [sic] rights in a treaty of cession. "Permissive," is used here to signify that such privileges would continue only so long as a specified branch of the United States government would allow the Indians involved to enjoy such prerogatives. Most often the legitimate authority to terminate such privileges specified in these thirteen treaties was the "President," meaning the Executive Branch, while less frequently Congress reserved that authority to itself. In such treaties, the Senate delegated to the Executive Branch the power to determine when the Indians would be obligated to evacuate the ceded areas, and/or to cease exploiting the resources thereof. In these treaties this "Permissive" limitation was phrased in one of several ways. The usufruct privileges would continue only "during the pleasure of the President," or "until the Indians are notified that the lands are wanted for settlement," or until the Indians were notified by the Executive Branch that they had to evacuate the area ceded and settle on a reservation set aside for them. This permissive limitation was written into treaties when there was some unpredictability or uncertainty about when the ceded lands were to be surveyed, placed on the market, and sold to settlers or otherwise conveyed to other parties. That is to say, when sufficient settlement pressure had developed that, in the

judgment of American authorities, Indians should be required to relocate and to seek their subsistence elsewhere, these authorities were preauthorized to make that decision. In practice, what would happen is that the General Land Office would take custody of the ceded lands, eventually survey them and place them on the market, and commence sales. Along the line the Commissioner of the GLO would consult with and advise the Commissioner of Indian Affairs about such developments. Then, at some point, the Commissioner of Indian Affairs would report to the Secretary of the War (before 1850) or the Secretary of the Interior (after 1850) that the President be solicited to issue orders terminating the Indians' occupation or usufrucht [sic] privileges. These are precisely the conditions which obtained in 1837 in northern Wisconsin where, at first, Royce Area 242 was wanted by the United States in order to foster the development of regional lumber industry, rather than an immediate rush of agricultural settlements. There was, at the time, some uncertainty about when such settlement pressure would develop, and so American authorities determined that it was expeditious to permit the Chippewa bands temporarily to continue their occupation and usufrucht [sic] of the ceded area, until such time that the Executive Branch decided that this interim privilege should be ended. The records of the 1837 negotiation are quite clear on this point. After several times advancing alternative proposals about continued occupation and use, and having these emphatically rejected, the Chippewa negotiators abandoned these efforts and accepted the Americans demand for an outright sale of all their rights to the area. Manifestly, the provisions of the 1837

Chippewa treaty restricting their continued occupation and usufrucht [sic] of Royce Area 242 to so long as the "pleasure of the president" allowed this, unmistakably places that treaty in this class. Other examples of limitations on continued usufrucht [sic] prerogatives of this type are found in Article 2 of the October 9, 1833 treaty with the Pawnee (7 Stat., 448); and Article 8 of the October 18, 1848 Treaty with the Menomini (9 Stat., 952). In my opinion, this "permissive" constraint is best seen a mere variant of the "conditional" restriction discussed in § 7, above. That is, it was a restriction which allowed American authorities considerable flexibility in determining when Indians had to surrender their privileges of exploiting the resources of ceded areas, as events involving the surveying, sale, and settlement unfolded in the future. In both instances, the aim of the United States was the same, to at some point eliminate the possibility of competition and conflict between the collective rights of a group of Indians as regards occupying or exploiting an area, and the rights of private citizens, local governments, and states and territories in land.

9. Next to last in frequency is a class of restrictions or limitations on continued usufrucht [sic] of ceded areas that may be called "Other," a catch-all for a wide variety of different kinds of constraints. Such limitations stipulated, for example, that the Indians would evacuate the ceded area "as soon as possible," or when they decided to resettle elsewhere, or when the United States provided them the means to do so. An example of one such is found in Article 4 of the treaty with the Kickapoo of August 30, 1819 (7 Stat., 202). The provisions of the 1837

Chippewa treaty do not belong in this class of limitations on continued usufrucht [sic].

10. Although treaties of the fifth and last type are exceedingly rare (there are but two in this class), because of recent controversies over the nature of the Chippewas rights of continuing usufrucht [sic] of ceded areas these two examples are particularly important. These two are the treaties where the United States expressly stipulated that certain usufrucht [sic] rights within a ceded area would be "perpetual," or that they would last "forever." The first of these two treaties negotiated by the United States and ratified by the Senate containing such a "perpetual" stipulation was with the small Chippewa bands of Sault Ste Marie on July 6, 1820 (7. Stat., 206). Article 3 of this 1820 Chippewa treaty granted these bands a "perpetual right of fishing at the falls of St. Mary's," and a small parcel for seasonal camping on an island near the fishing ground. This "perpetual right," in fact, lasted only thirty-five years, for in an 1855 treaty these Chippewa surrendered this right to the United States in return for a cash payment. The second such treaty was negotiated on June 9, 1863, with the Nez Percé (14 Stat., 647). Article 8 of this 1863 treaty granted the Nez Percé, not hunting or fishing rights in a ceded area, but perpetual rights of access to certain "springs and fountains" for watering their stock, which right they were to forever share in common with whites, with the United States guaranteeing that it would withhold these "springs and fountains" from sale and safeguard them for the in-common use of the Nez Percé and their American neighbors. Obviously, the United States during the treaty era was extremely

circumspect about preparing and ratifying treaty stipulations guaranteeing that occupation or use privileges in areas ceded by Indians would endure forever. Moreover, these two treaties amply demonstrate that when American authorities saw fit to agree to such durable prerogatives they could and would do so explicitly, and the Senate would ratify such guarantees. Manifestly, in the 1837 Chippewa treaty, there was no explicit stipulation that the privileges of occupying and exploiting the resources of Royce Area 242 was anything but temporary, lasting only until such date as the President exercised his authority to cancel them. Moreover, the records of this 1837 treaty clearly indicate that no promises of perpetuity with respect to such privileges were made verbally to the Chippewa during the process of its negotiation, and there is no valid evidence to suggest that the Chippewa negotiators believed otherwise at that time.

11. The full historical record of the negotiation of the 1837 Chippewa treaty supports this construction, that during the negotiation of this contract no promise was communicated, and no understanding reached between the parties, concerning a "perpetual" right to the occupation or usufrucht [sic] of the ceded region, Royce Area 242, even one conditional on "good behavior." As mentioned in § 4, above, during its negotiation the designated Chippewa spokesmen did advance alternatives, that they would cede only the pine land areas and reserve the balance for themselves, or that they would consider a sixty-year "lease" permitting lumbering, but leaving the land and the waters of the band territories in their possession, or that they would sell the band territories but wished to be permitted to reserve the right of hunting

and fishing on them. All such alternative proposals were flatly rejected. In rejecting them, Governor Henry Dodge made it plain that such proposals could not be considered, and he carefully enunciated the limitations which could and would be placed on their continuing use of the ceded lands. For example, on Thursday, July 27, 1837, responding to one such leading speaker, *Maghegabo* (The Trap), Governor Dodge replied: "It is proper for me to explain to you that your Great Father, never buys land for a term of years. I will agree on the part of the President, that you shall have the free use of the rivers, and the privilege of hunting upon the lands you are to sell to the United States, during his pleasure. If you sell these lands, you must sell them as all other nations of Indians have done; . . . " Similarly, on Friday, July 28, 1837, responding to the leading speaker, *Aishkebogikozhe* (Flat Mouth), who had proposed that the Chippewa be allowed to reserve the right of hunting and fishing, Governor Dodge replied: "My Friends, I have listened with great attention to your Chief, from Leech Lake. I will make known to your Great Father, your request to be permitted to make sugar, on the lands; and you will be allowed, during his pleasure, to hunt and fish on them. It will probably be many years, before your Great Father will want all these lands for the use of his white Children." At this point, the Chippewa negotiators dropped further mention of such alternatives to an outright cession, and, after further discussions with their American advisors, they settled down to the serious business of bargaining for the best price for the sale of their lands. (Verplanck van Antwerp [Secretary of the Treaty Commission], September 30, 1837, transmitting the Journal of Proceedings of July 20-29, 1837. Reprinted

verbatim from the original in Record Group 75 files, National Archives, in Ronald N. Satz, *Chippewa Treaty Rights. Transactions of the Wisconsin Academy of Sciences, Arts and Letters*, Vol. 79, No. 1, 1991, pp. 131-153).

12. Twenty-seven years after the Chippewa negotiators had accepted the terms proposed by Governor Dodge, and had agreed to the outright sale, including their usufruchtory [sic] rights in and to Royce Area 242, their descendants assembled in the winter of 1864 at Bad River, Wisconsin to set down in writing a bilingual (Chippewa-English) petition laying out their complaints and their supposed recollections of the 1837 and all their other treaties. This petition was carried by a Chippewa delegation to Washington, D.C. in February, 1865, where it was shown to Commissioner of Indian Affairs William P. Dole (who took no further action), then returned to Wisconsin, where it was eventually deposited in the archives of the State Historical Society. This important document was drawn up at a time when these Chippewas' annuity payments from all their treaties had expired or were about to expire. Hence, it represented an effort on their part to extract additional compensation from the United States, so the recollections of past events it proffered were, at best, highly selective and colored by their wishes. In this document, the authors in 1864 laid out a distorted and confused version of the alternative proposals for either leasing the tract to the United States or selling only certain rights to the area which, twenty-seven years earlier, The Trap and Flat Mouth had unsuccessfully proposed to Governor Dodge, before agreeing to an outright sale of their occupation and usufrucht [sic]

rights to Royce Area 242. In this 1864 document, understandably, there was no mention made of the 1837 agreement that their continued occupation and use of the ceded lands was contingent upon the permission of the President. On the contrary, this delegation argued that they had never sold Royce Area 242 at all, but had merely "loaned" it to the United States (Statement of the Treaties between the Chippewa Indians and the United States from the Chippewa Viewpoint. Ms. File 1864, State Historical Society of Wisconsin, Madison. Reprinted verbatim [with a modern translation] in, *"Statement Made By the Indians": A Bilingual Petition of the Chippewas of Lake Superior.* Text Series No. 1, Centre for Research and Teaching of Canadian Native Languages, University of Western Ontario, London, Ontario, 1988.).

13. There was an independent eye-witness to the negotiation of the 1837 treaty, who set down his comments on its terms soon after the treaty was signed. This was an experienced missionary, the Rev. William T. Boutwell. The Rev. Boutwell's contemporaneous commentary on the "permissive" limitation placed on the privilege of continuing Chippewa occupation and usufrucht [sic] of the area ceded area is telling. He warned of "trouble with the Chipys. before five years should they attempt to remove them . . . the Ind[ians] have no idea of leaving their country while they live – they know nothing of the duration of a man[']s pleasure." In effect, Boutwell was advising his mission's director in Boston on two points, (1) that the Chippewa bands occupying the ceded areas would resist relocation elsewhere if the United States violated Governor Dodge's verbal promise that such a step would not be taken for many years; and (2) that

these notoriously individualistic Chippewa were apt to resist any authoritative decision made about their privileges and welfare by a distant power figure. In both historical and anthropological perspective, the Rev. Boutwell's warning makes some good sense. In 1837, the Chippewa negotiators had been explicitly promised on the treaty grounds that their lands would probably not be needed for settlement by Americans for many years, so resistance to premature pressure for resettlement was predictable. On the other hand, whether or not these Chippewa would also resist a decision made by the President affecting their lives would depend largely on the nature of that decision, and whether or not they individually agreed to it. The 1865 "Statement of the Indians" is a case in point. With that petition the Chippewa sought to influence the "pleasure of the president," or some other authorities in Washington, in their favor, and they certainly would not at that moment have rejected a presidential edict that their annuities should be continued beyond the terms specified in the treaties. However, the underlying point that the Rev. Boutwell made must be emphasized. He was pointing out that the problems he foresaw would be caused by the explicit provision of the 1837 treaty which made these Chippewas' continued usufrucht [sic] of the ceded area entirely subject to the "pleasure of the president," with no other conditions attached thereto. Had any verbal assurance been made during negotiations qualifying this power of unilateral presidential cessation of the privilege, especially one making continuity of this privilege dependent upon Chippewa "good behavior," then this independent eye-witness would certainly have

mentioned it in his correspondence. He did not do so. It never happened.

14. Regrettably, the supposed recollections of an old settler in Ashland, Wisconsin have sometimes been employed to bolster the argument that, instead of the Chippewas' continuity of occupation and usufrucht [sic] being subject only to the continuing permission of the Executive Branch, these Indians had instead been promised that they would be allowed to remain on and to exploit the lands so long as they conducted themselves peacefully. The suspect document is Benjamin J. Armstrong's *Early Life Among the Indians* (Ashland, Wisconsin, 1892. Reprinted in four parts as, "Reminiscences of Life Among the Chippewa," *Wisconsin Magazine of History*. Vol. 55 (3 & 4), and Vol. 56 (1 & 2), 1972-1973). This document must be used with great care because, while there is little or no independent evidence to support Armstrong's boastful claims that he served the Chippewa as "interpreter, confidant, sturdy defender, trusted advisor, and finally as historian," much evidence shows that he greatly inflated his own standing among these Indians, and that he had little or nothing to do with numerous exploits on their behalf by other parties which much later he took credit for. Moreover, how much of the contents of this document represent Armstrong's actual recollections in his old-age, looking back on events of a half-century or more earlier, how much of it consists of materials plagiarized from previously published sources, and how much of it represents the journalistic license of the two newspapermen who first collected Armstrong's stories, and then rewrote and edited them into a form suitable for

publication, are all questionable. In any respect, Armstrong certainly was not an eye-witness to the 1837 Chippewa treaty (he was in Hannibal, Missouri at the time). Consequently, his much embellished descriptions of what transpired at this treaty's negotiation were based on either hearsay or they consist of his own or his editors' inventive embroidery, or both. It was in the context of such story-telling that Armstrong (or his editor) recorded that in 1837 "the Indians were told and they distinctly understood that they were not to be disturbed in the possession of their lands so long as their men behaved themselves," also asserting that it was not until 1849 that these Chippewa first understood that they had ceded their lands entirely. (*Wisconsin Magazine of History* edition, Vol. 55 (3), pp. 178-179). There is no independent, contemporaneous evidence for such imaginative portrayals, and much which flatly contradicts Armstrong's tale. So his alleged "reminiscences" cannot be trusted as a valid and authentic source of understanding of the commitments made to and by the Chippewa in 1837.

15. **SUMMARY OPINION**. During the prolonged negotiations for the Treaty of July 29, 1837, the American negotiators effectively communicated to their Chippewa counterparts that the United States wanted from them an agreement to the outright sale of all Chippewa rights in and to certain Chippewa band territories, which are now identified as Royce Area 242. For their part, the Chippewa negotiators attempted to persuade the American authorities to accept one of several alternative transactions, consisting of the possibility of leasing the area for sixty years, or of selling parts of it and retaining the balance, or of selling the whole and reserving usufrucht

[sic] rights in the ceded area, while establishing reservations for their occupation. All such Chippewa alternatives were firmly rejected by the Americans' chief negotiator, Governor Henry Dodge. Moreover, Governor Dodge carefully explained why such alternatives could not and were not to be allowed.

However, after listening to the Chippewas' own proposals, Governor Dodge did agree to permit the Chippewa bands temporarily to continue their occupation and usufrucht [sic] of the area being ceded to the United States, subject only to the later unilateral decision of the President that the time had come to end this interim privilege. Governor Dodge added this temporary privilege as an explicit stipulation in the 1837 treaty, using the phrase "during the pleasure of the president" to signify how it would be ended. He did so because he came to the treaty grounds with the knowledge that the immediate, short-term interests of the United States in purchasing all Chippewa rights to Royce Area 242 consisted of facilitating the development of a lumber industry. He also anticipated that it would be some years before American settlers would flow into the Royce Area 242, thence creating a dangerous potential for competition and conflict between such settlers and those Chippewa remaining in the ceded lands over the natural resources of the area. These expectations Governor Dodge also carefully explained to the Chippewa negotiators. In responding to Chippewa overtures with a grant of a temporary privilege of continued occupation and usufrucht [sic], Governor Dodge in effect fashioned a compromise satisfactory to both parties. Moreover, when he was pressed on the duration of this temporary privilege, Governor Dodge

explained verbally that it would be "many years" before Royce Area 242 would be needed for American settlers, hence many years before the President would exercise his authority to terminate the limited privileges given the Chippewa in this treaty. This verbal assurance, qualifying the authority explicitly given the president, did not appear in the treaty as set down in writing, although it was made a part of the official record of the debates between Governor Dodge and his Chippewa counterparts, and I assume it must carry substantial weight for that reason. At that point in the negotiations, the Chippewa leaders abandoned their efforts to obtain an agreement on one of the alternatives they had proposed. There can be no doubt that they had been made to understand, and they that did fully understand, that this transaction consisted of an outright sale of all their occupation and usufrucht [sic] rights, qualified only by the temporary privilege of continued occupation and usufrucht [sic], until the time, "many years" later, when the president could legitimately terminate this privilege.

There is no valid contemporaneous evidence that the Chippewa negotiators in 1837 held any different views concerning these temporary rights of occupation and usufrucht [sic], or concerning the mechanism they had agreed to which would end them. Specifically, there is no such evidence that they believed they had been promised the privilege of occupying and exploiting the resources of the ceded area perennially, so long as they stayed on their "good behavior." In historical fact, it was "many years" later, after an executive order had been issued ending this privilege, that such an "understanding" first surfaced. After 1850, the argument that in 1837 the Chippewa had

been promised the right of living on and enjoying the resources of Royce Area 242 first surfaced, and was presented as a justification as to why these privileges should not then be rescinded. Then, in 1864, as discussed in § 12, above, a group of Chippewa chiefs assembled and placed a quite different construction on what their predecessors had "understood" in 1837. In the 1864 instance, this construction was that in 1837 the Chippewa had not ceded the area at all, but had merely "loaned" it to the United States.

Such ex post facto accounts are not valid ethnohistorical evidence of what transpired in 1837 during the negotiations that year. They consist of latter-day inventive rationalizations, efforts to make a case which might bring fresh benefits to those who fabricated them.

FURTHER YOUR AFFIANT SAITH NOT.

/s/ James A. Clifton Aug. 26, 1995
James A. Clifton, Ph.D. DATE

Subscribed and Sworn Before Me
This 26th day of August, 1995.

/s/ Kevin Pedersen
NOTARY PUBLIC

Kevin Pedersen
Notary Public

Kalamazoo County, Michigan

My Commission expires Feb. 19, 1999

November 1, 1995, Supplementary Affidavit Of Ethnohistorian James A. Clifton, Ph.D.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Mille Lacs Band of Chippewa Indians, Arthur Gabow, Walter Sutton, Carleen Benjamin, and Joseph Dunkley,	Civil No. 3-94-1226
Plaintiffs,	Judge Michael J. Davis
United States of America,	Magistrate-Judge Jonathan G. Lebedoff
Plantiff [sic]-Intervenor,	
St. Croix Chippewa Indians, et al. Lac du Flambeau Band, et al. Bad River Band of Lake Superior, et al. Lac Courte Oreilles Indians, et al. Sokaogan Chippewa Community, et al. Red Cliff Band of Lake Superior, et al.	SUPPLEMENTARY AFFIDAVIT OF JAMES A. CLIFTON, Ph.D. (November 1, 1995)
Plantiff [sic]-Intervenors,	
vs.	
State of Minnesota, Minnesota Department of Natural Resources, and Ron Sando, Commissioner of Natural Resources	
Defendants,	
County of Aitkin, Benton, et. al., John W. Thompson, et al.,	
Defendant-Intervenors,	
Save Lake Mille Lacs Association,	
Amicus Curiae.	

I, Dr. James A. Clifton, being first duly sworn, do hereby state as follows:

1. I have been asked by Persian, MacGregor, and Thompson, attorneys for the six landowners who are parties to the above captioned litigation, to comment on certain parts of two memoranda delivered to the court by attorneys representing the plaintiff and plaintiff-intervenor subsequent to my original affidavit dated August 26, 1995. These memoranda are titled, (1) "Plaintiff and Plaintiff-Intervenor Bands' Memorandum in Opposition to State's and Landowners' Motions for Summary Judgment re Indian Claims Commission and 1854 Treaty" (pp. 19, 26-27, & 29-30); and, (2) "Plaintiff and Plaintiff-Intervenor Bands' Memorandum in Opposition to Counties' and Landowners' Motions for Summary Judgment re 1850 Executive Order" (pp. 20-21 & 24).

2. These pages of the two memoranda draw upon selected passages of a report I prepared, dated August 30, 1980, which was delivered to attorneys representing the Lac Courte Oreilles Band of Chippewa in a phase of the Wisconsin Chippewa or "Voigt" case, which I understood was then on appeal before the 7th Circuit Court of Appeals. This report was titled, "The Lac Courte Oreilles Band of Chippewa and the Treaties of 1837, 1842, and 1854: A Research Report." What use was made of this report at that time for the purposes of the appeal, if any, I do not know.

3. At issue are certain apparent differences between some of the interpretations, conclusions, and opinions reached in my 1980 Research Report, and those laid out concerning the same historic events in my recent August

26, 1995 affidavit in this current litigation. I have been asked specifically to explain how it is that these differences came to be.

4. The research I did for the 1980 Report was accomplished with quite limited resources, in a tight time frame, facing court imposed deadlines. Moreover, a large portion of this report (pp. 46-69) was not concerned with the treaties of 1837, 1842, or 1854 at all. Rather, this part of my research and report address the question of whether the Lac Courte Oreilles Band of Chippewa could have subsisted for long had they confined their economic activities exclusively to the totality of resources available to them on the reservation established for their occupation and use in 1874, under the terms of the 1854 treaty. This question I thought had to be answered if the tendency of these Chippewa to rely on resources outside the reservation was to be understood and explained.

5. Moreover, that 1980 Report was submitted to the attorneys representing the Lac Courte Oreilles Chippewa in "raw" form. That is, it had not been subjected to, and I did not have the benefit of the kind of peer review, criticism, correction, and suggestion that ordinarily accompanies scholarly writing and publication.

6. To some degree relying on my 1980 report for any contemporary purpose is, perhaps, disingenuous. This is so because many of my earlier characterizations of the negotiation of the 1837, 1842, and 1854 treaties, and the nature and consequences of these treaties, have been qualified, corrected, and enhanced by later extensive research, writing, and scholarly publication. For example,

by the summer of 1985 attorneys representing the Wisconsin Chippewa bands in subsequent phases of the Voigt case had available to them a prepublication draft of a lengthy essay reporting on my own independent, basic research results pertaining to the Wisconsin Chippewa and their treaties. This was later published as "Wisconsin Death March: Explaining the Extremes in Old Northwest Indian Removal" (*Transactions of the Wisconsin Academy of Sciences, Arts, and Letters,* Vol. 75, pp. 1-39. 1987). A true and correct copy of this work is attached hereto as exhibit A and incorporates the contents of exhibit A by reference. Moreover, when in the late summer of 1985 I was again called to serve as an expert witness by the Wisconsin Chippewa bands involved in the "Voigt" case, I explained to the attorneys representing these bands that my further research and conclusions did not support some of the interpretations and "theories" they wished to advance. Clearly, attorneys representing the plaintiffs and plaintiff-intervenors in this present case prefer to draw upon selected parts of my 1980 report, which they apparently believe support positions they are taking in the current litigation.

7. However, my 1987 "Wisconsin Death March" essay largely super cedes the 1980 report, particularly so in the parts dealing with the 1837, 1842, and 1854 treaties. This 1987 essay was the result of especially intensive, long-term basic research on the topic of Old Northwest Indian Removal covering the period 1825-1855, most of which was accomplished after 1980. This research was supported by a three-year basic research grant from the National Endowment of the Humanities, and smaller research grants from the American Council of Learned

Societies, the Cleveland Foundation, and the Canadian Ethnology Service.

8. During the research for this "Wisconsin Death March" essay I had located a great many documentary sources which were not available to me for the earlier, 1980 report. This assertion can be readily verified by comparing the sources cited in my 1980 report with those cited in my 1987 essay. Further, I circulated prepublication drafts of the "Wisconsin Death March" essay to about fifty knowledgeable scholars, including leading anthropologists, historians, and historical geographers. Of these, fifteen took the trouble to send me particularly valuable suggestions, corrections, criticisms, and additional documentation (see "Wisconsin Death March," p. 32, n. 1). In addition to this peer review, which I personally solicited, the editors of three history journals sent drafts of the essay to seven anonymous peer reviewers, who also delivered extensive useful commentaries and suggestions. In preparing the final draft for publication in the *Transactions of the Wisconsin Academy of Sciences, Arts, and Letters,* I took all of these criticisms and suggestions into consideration, and incorporated many of them into my final draft.

9. In the light of this extensive additional basic research, and with the useful recommendations and commentaries from more than twenty outside scholarly readers in hand, I certainly did revise a good many of my earlier characterizations of the process of negotiating the 1837, 1842, and 1854 treaties, my statements concerning the nature of these treaties, and my assessments of their

consequences. As a reputable scholar, it would have been irresponsible for me not to do so.

10. Consequently, if anyone wishes to use my research and writing about the Chippewa bands which were affected by the treaties of 1837, 1842, and 1854, they would far better serve the interests of the court in obtaining the best scholarly knowledge by delivering my 1987 "Wisconsin Death March" essay, rather than relying on selected excerpts from my 1980 Report, which has been long super ceded. Nothing in my 1987 essay is inconsistent with my August 23, 1995 affidavit.

10. On page 3 of original, August 23, 1995 affidavit in this case, I expressly indicated that the interpretations and opinions offered were mainly based upon my "earlier research and writing bearing on the pertinent treaties with the Wisconsin-Minnesota Chippewa bands." This was a reference to the research reported in my "Wisconsin Death March" essay, not to the 1980 report, which I had not looked at since about 1983. However, in the same place I further remarked that I had also "incorporated some parts of my other research concerning ratified Indian treaties." This was a reference to the computerized database consisting of a synthetic classification of all Indian treaties ratified by the United States Senate that I have assembled, edited, and compiled (James A. Clifton, comp., *366 Ratified Indian Treaties: A Computerized Database*, © 1990, 1993). This work was produced in the late 1980s, and was designed to facilitate objective comparison and contrast of the nature and substance of all ratified Indian Treaties. This database has the benefit of exhaustive, comparative quantitative and qualitative examination of many particular features of all ratified

Indian treaties. Those portions of my August 23, 1995 affidavit which characterize certain features of the 1837, 1842, and 1854 Chippewa treaties by placing them in full comparative and historical context are derived from an analysis accomplished by using this database, rather than the ad hoc, selective, piecemeal characterizations of treaties which are commonly delivered to the courts as evidence. These assertions and generalizations in my affidavit can be readily checked and verified by anyone who will take the trouble to examine the treaties cited. These are statements of fact, not opinion.

11. In closing, I will take this opportunity to correct two errors of omission in my August 26, 1995 affidavit.

A. On page 18 of that affidavit, I neglected to insert a citation for the quote from the report of the Rev. Boutwell. This citation is as follows: Rev. William T. Boutwell to Rev. David Green, August 17, 1837, *American Board of Commissioners for Foreign Missions Papers*. Houghton Library, Harvard University (Box 2, TS Transcripts of originals in Minnesota Historical Society).

B. Further, on page 10 of my August 23, 1995 affidavit, I indicated that there were a total of only ten ratified treaties wherein the United States and the tribes expressly agreed that the Indians would have to maintain peaceful relations as a condition for continued usufrucht [sic] privileges on lands being ceded. There were in fact eleven such treaties. Because of a typographic error in my database, I had missed the eleventh. This additional treaty containing such a provision was the Treaty with the

Quapaw of August 8, 1818 (7 Stat. 176). However, this omission in no way alters the major conclusions concerning this matter in my earlier affidavit. These were as follows: When the United States wished to impose a condition of peaceful relations for the continuation of such a usufrucht [sic] privilege, it could and would do so. This condition was rarely imposed, in only eleven (not ten) of the 366 ratified Indian treaties. With one exception, the Menomini treaty at 1831, such a condition or limitation was never imposed in any treaty with any of the tribes of the Old Northwest. Specifically, this condition was never agreed to in any treaty with the Chippewa of Wisconsin and Minnesota.

FURTHER YOUR AFFIANT SAITH NOT.

/s/ James A. Clifton 1st November, 1995
James A. Clifton, Ph. D. DATE

Subscribed and Sworn Before Me
This 1st day of November, 1995.
/s/ PATTI L. VESEY
PATTI L. VESEY
Notary PUBLIC, Van Buren County, Michigan
My Commission Expires September 20, 1998

EXHIBIT A

A REPRINT

FROM

TRANSACTIONS OF THE WISCONSIN ACADEMY OF SCIENCES, ARTS AND LETTERS

Volume 75, 1987

Wisconsin Death March: Explaining the Extremes in Old Northwest Indian Removal[1]

James A. Clifton

Throughout the fall of 1850, four officials of Zachary Taylor's administration conspired to lure the Lake Superior Chippewa Indians away from their lands in Northern Wisconsin and Michigan's Upper Peninsula.[2] Two of these officials, Secretary of the Interior Thomas Ewing and Commissioner of Indian Affairs Orlando Brown, provided the initial approval for the plan, but they did not remain in office long enough to witness its disastrous results. The others, Minnesota Territory's governor, Alexander Ramsey, and Sub-Agent John Watrous, were directly involved as prime movers from start to end. By moving the place for the annual annuity payments to a new temporary sub-agency at Sandy Lake on the east bank of the upper Mississippi and by stalling the delivery of annuity goods and money, they planned to trap the Chippewa by winter weather, thus forcing them to remain at this remote, isolated location.

This scheme, kept secrete from both local Americans and the Chippewa, was designed to break the tenacious resistance of these Indians, who had rebuffed earlier efforts to persuade them to resettle in northwestern Minnesota. The stratagem failed. It succeeded only in reinforcing the opposition of the Chippewa to relocation even though it had killed large numbers of them: of the some three thousand (mostly adult males) who gathered at Sandy Lake in early October, some four hundred died before the survivors could make their way back to their homes by the following January.[3]

This incident was demonstrably atypical of the experiences of the two dozen other Indian populations in the Old Northwest who were subject to the Indian Removal policy between 1825 and the early 1850s.[4]. On the contrary, judged by the degree of physiological stress and the casualty rate suffered during the relocation process, the Lake Superior Chippewa case represents an extreme. As such, it deserves special attention, since it and others like it generated much contemporaneous commentary while exposing the interests, aims, and intrigues of the diverse denominational, political, economic, and ethnic interests directly involved. Moreover, because it represents one extreme, to be fully understood, this Chippewa case must be compared with other cases of Old Northwest Indians subject to dislocation and resettlement. By examining the Lake Superior Chippewa case both intensively and comparatively, we can better appreciate how Old Northwest Indian communities reacted resourcefully and variously to American policy initiatives. In the Chippewa case the Indians drew effectively on a variety of relationships with

and the support of Wisconsin citizens to oppose the interlocking national, regional, and local patronage system which, rather than "settlement pressure," had fueled the drive for their relocation.

Although these Chippewa were certainly victimized by a few American officials and punished by events under no individual's control, ultimately they emerged from this confrontation as victors. During the three years following the abortive effort to dislodge them, they effectively maneuvered, procrastinated, and negotiated to a standstill those functionaries still bent on their dislocation, and in the end achieved their major goal of remaining on reservations within their preferred habitats in Wisconsin and Michigan by explicit treaty-specified right. Moreover, the Chippewa were not alone among the Indians of the Old Northwest in successfully thwarting American efforts to implement the removal policy. Systematic study of the diverse responses of the two dozen groups of Indians in the region subject to the various tactics of Americans to move them west makes this eminently clear and contributes further insights into the distinctive features of the Chippewa case.

Of the more than forty efforts between 1825 and 1855 to bring about the westward resettlement of Old Northwest Indians, there were just four where outright force, or – as in the Chippewa example – furtive deception and trickery, were employed to produce the results desired by federal administrators. In these few cases, the coercive tactics used contributed to extraordinary hardship and fatalities, consequences that can be, in some part, plausibly attributed to the actions of American authorities. The other three involved Black Hawk's band of recalcitrant

Sauk, Fox, and Kickapoo in 1831-1832, certain villages of the Indiana Potawatomi in 1838, and the Winnebago intermittently over the course of a decade and more after 1838.[5]

Although each of these four cases had its own distinguishing features, they shared a series of specific common antecedents, one or more of which were lacking in all other attempts to dislodge and to relocate groups of Old Northwest Indians. These features in combination conditioned the resort by Americans to coercion or deception. In sequence, the first of these was a serious, prolonged, public dispute over the legitimacy of a treaty obligation, with the Indians vehemently denying the right of Americans to demand the surrender of particular tracts and their resettlement and with their adversaries hewing to the right to evict. Next, such a dispute had to be moved to a crisis point, with the Indians adamantly rejecting further American efforts at verbal persuasion and the various incentives proffered. Finally, there had to be present politically influential local Americans with strong vested interests in securing the dislocation, transportation, and resettlement in particular places of the Indians involved. These interests were varied and intertwined. They included some combination of local political prestige, career enhancement, visionary dreams of ecclesiastical colonies, control of patronage resources, profound power needs, ideological convictions, the need for immediate income, the aim of thwarting rivals, the lure of capital accumulation, and others more or less distinguishable in the historical record.[6]

Lacking one or more of these three conditions, American authorities did not use force to drive Indians west in

a manner that fits the "Trail of Tears" stereotype. Ordinarily, officials relied on personal influence, on oral argument (enumerating what they defined as the positive inducements for moving and the disincentives for remaining), and on the dispositions of the Indians to cooperate in what must be defined as encouraged, but not forced, migrations. Similarly, numerous groups of Old Northwest Indians, sometimes differing with Americans on the stipulations in treaty engagements, sometimes not, did not press the issue, but instead escaped or evaded the removal policy entirely. By avoiding direct confrontation, such dissidents avoided a situation in which Americans were moved to use the exorbitantly expensive, often ineffective, and morally demeaning option of armed escort and manifest compulsion.

Three different cases together represent the antithesis of the Lake Superior Chippewas' extraordinary experience. In September, 1837, the Mdewakonton Dakota (Sioux), for example, sold their remaining claim to lands in western Wisconsin in what has been called a "removal" treaty. However, their relocation was to them a profitable non-event. As their capable agent, Lawrence Taliaferro, remarked in 1836, they were only maintaining the semblance of a presence in their former territory east of the Mississippi "so as to get a good price for it in case of a desire on the part of the U States to purchase."[7] They had earlier abandoned these lands, owing to pressures from intrusive Chippewa and other ecological and social imperatives (well described by Gary C. Anderson.[8] With the help of Agent Taliaferro, who blew fluff into the ears of Washington officials about the desirability of "removing" these Indians to the west, the Dakota leaders then

negotiated a treaty that provided them nearly a million dollars for lands they could neither safely occupy nor productively use. As of the fall of 1837, there were no Dakota east of the Mississippi to be "removed." Prompted and advised by Taliaferro, they had seen in the removal policy an opportunity for large profits at no cost to themselves. The Dakota were not alone among Indians of the region who recognized positive incentives in American initiatives that others, such as the Chippewa bands nearby, defined as menacing rather than beneficial.

Among those Indians who found opportunities in the removal policy were two groups that could not be touched by American authority, for they were British subjects residing in Canada. These voluntary participants came from among the Hurons of Anderdon Township and the Christian Indians (i.e., Moravian Delaware) of New Fairfield, Canada West. Both represented schismatic divisions of fully Christianized, literate, self-governing, predominantly English-speaking communities organized as townships in the Province of Canada.[9] In both these cases, the decision to emigrate came after a long irresolvable factional dispute involving efforts of the Crown to purchase large portions of their reserved estates. Those who elected to emigrate were groups who favored both the sale and emigration to the West, moves long blocked by their rivals.

In neither instance was there a hint of American influence during the preliminaries. Instead, responding to solicitations from related peoples with similar concerns in the United States, both the Moravian and the Huron factions approached American authorities for permission to participate in the removal program. For the Moravians,

the invitation had come from the "Missouri Party" of the Stockbridge-Munsee in eastern Wisconsin, a faction which also favored resettlement.[10] Theirs was a considerable feat-of-arms, certainly demonstrating great enthusiasm for the journey. For in 1837 some 202 Moravians departed the Thames River valley in open Mackinaw boats, rowing their way across the western Great Lakes, via the Green Bay-Fox-Wisconsin River waterway to the Mississippi, and then traveling by steamer to St. Louis and eastern Kansas. In 1843, fewer Anderdon Hurons traveled west – making an easier trip of it by canal boat and river steamer – with their relatives and Methodist confreres among the Ohio Wyandot. In neither instance did all from these Canadian emigrant parties long remain in the Indian Territory.[11] Many soon leased or sold their "head rights" to the land they had acquired and promptly returned to Canada.

In contrast were the responses of several major groups of Indians that evaded or avoided the plans of Americans by one device or another. Numerous Potawatomi, Ohio Ottawa, and smaller numbers from other tribes slipped across the international border, using Canada as a temporary or permanent refuge, while others moved into northeastern Michigan or northern Wisconsin. Then there were more who – like those master escape artists, the Winnebago – simply refused to stay put after being repeatedly transported west of the Mississippi.[12]

Moving Indians into western lands selected by Americans for their supposedly exclusive and permanent occupation was one matter; keeping them there was an entirely different and often far more difficult one. As the exasperated Governor Alexander Ramsey complained

from Minnesota Territory in the fall of 1851, "No argus-eyed vigilance on the part of officers of the Indian department can erect a Chinese wall between this tribe [the equestrian Winnebago] and the inhabitants of Wisconsin."[13] His annoyance stemmed not only from the reluctance of dislocated Indians to stay where they were replanted, but also from the willingness of many Americans near their former homes to tolerate or even ease their return. Obviously, the removal policy at this date was out of tune with the disposition of peregrinating Indians and with the sentiments of numerous citizens of Wisconsin and Michigan as well.

Although his grievance was expressed a year after the scheme for displacing the Lake Superior Chippewa was conceived and set in motion, Ramsey had been one of the four actors most responsible for the design and through 1851 had actively promoted efforts to carry it out. If other Indians like the Winnebago could not – short of building and manning a "Chinese wall" – be separated from their old homes, then what sense was there in Ramsey's conniving to transport west yet another large population of manifestly unwilling, notably ambulatory Indians?

That the Chippewa were to be settled within the governor's jurisdiction, however temporarily, is but part of a necessarily complex answer to this query. There were, to be sure, considerable political and economic rewards to be gained simply from the business of transporting Indians westward, as Ramsey knew, even should they immediately counter-march. Yet this fragment of an explanation still leaves a large puzzle. How, in 1850, did a Secretary of the Interior, a Commissioner of Indians

Affairs, a Territorial Governor, and a lowly Indian Sub-Agent come to concoct a scheme that, in the end, caused the loss of many Chippewa lives and yet left the Chippewa in Wisconsin?

[PICTURE OMITTED IN PRINTING]

The scheme was designed a dozen years after Andrew Jackson and other leading advocates of removal had declared implementation of the policy a success, "as having been practically settled."[14] The United States of 1850 was no longer the geographically compact republic anticipated in 1803 when Jefferson first conceived of defusing federal-state tensions by displacing unwanted Indians into a vast, newly acquired western territory. Nor was it the developing nation of 1825, when a "permissive" policy of community-by-community resettlement was issued by Executive Proclamation, or that of 1830, when the formal, comprehensive, nationwide provisions of the Indian Removal Act obtained congressional sanction.[15] By 1850, the ideology of Manifest Destiny had been announced and affirmed, the Mexican war won, Continentalism achieved. No national leader could any longer confidently believe that conflicts involving culturally alien, not readily assimilable Indians might be avoided by relocating them "permanently" in a huge western Indian Territory on lands that would be forever theirs. By 1850, this was no more a realistic plan than was the abortive parallel policy of reducing sectional tensions over slavery by repatriating Afro-Americans to Liberia.[16]

The political pressure for Indian Removal was effectively removed by events of the latter 1840s, which saw

the emergence of a geographically larger, socially more complex United States. The new continental nation was far more diverse ethnically than it had been when the removal and repatriation schemes were conceived. Nevertheless, through the 1830s and 1840s the promise of permanency of tenure on tribal lands in an exclusively Indian Territory legislated in the 1830 Removal Act (essentially a segregated native homeland or apartheid policy) was confirmed in every proper removal treaty. No such stipulation was included in those negotiated with the Lake Superior Chippewa in 1837 and 1842 for the cession of their lands east of the Mississippi. The 1850 effort to dislodge them from Wisconsin and to resettle them near Sandy Lake – east of the Mississippi – involved a temporary location only, because of their specific history of dealings with the United States.

Occupying the farthest northwestern reaches of the Old Northwest, the Lake Superior Chippewa were the last Indians of that Territory to have their independence erased by formal treaty agreement with the United States. Although placed under nominal American sovereignty in the 1783 Treaty of Paris and again in the Treaty of Greenville in 1795, this was a status unknown to these Indians – who remained in a position of unqualified political autonomy. The degree of their continuing independence was marked by two developments. Unlike other foraging bands near them, they had sat out the War of 1812, declining British invitations to join in active military operations. Thus, not considered enemies by American authorities, they did not participate in any of the several subsequent peace treaties pressed on neighboring Indians – including related Chippewa bands – when hostilities

ended. These postwar compacts restored the status quo antebellum and required a fresh acknowledgement of American authority in the region, which the Lake Superior Chippewa had yet to deliver. Moreover, throughout the removal era, the Lake Superior Chippewa continued a century-old pattern of warfare against their Dakota neighbors, as good a measure as any of their autarchy and a major concern of Americans attempting to impose peace on this frontier.

Such concerns were expressed between 1825 and 1827, when three treaties were required at last to bring all these small, scattered Chippewa bands under some measure of American authority.[17] These agreements established the meets and bounds of Lake Superior Chippewa lands, declared a "peace" between the Chippewa and their Indian neighbors, defined a new subordinate political status for them, and included provisions for modest educational services and the payment of a minor annual annuity. So far as American authorities were concerned, these Chippewa thereby became dependent client societies.

Yet for a decade these agreements had little consequence for the daily lives of these Indians. No lands were ceded, while the small annuity fund and scanty Indian Office services provided were delivered mainly to those Chippewa living near Sault Ste Marie. For another full decade, contacts between the Lake Superior Chippewa and Americans, other than traders and a few ineffective missionaries, remained occasional and minor. However, these three treaties expressed the legal foundation for the Chippewa's political and economic future. The "tribal" boundary agreements, for example, were intended to

ease, and were later used for, land sale negotiations, whereas at Fond du Lac (Duluth) in 1826, American negotiators had obtained a vaguely defined privilege from the Chippewa: "to search for, and carry away, any metals or minerals from any part of their country."[18] Sixteen years later, when at La Pointe the Chippewa were pressed hard to cede their last remaining lands east of the Mississippi River, this seemingly minor stipulation about exploration for mineral samples was used as a weapon to defeat their resistance.

For nearly a decade following acknowledgement of their dependent status, few new settlers or entrepreneurs appeared among them, especially in the interior away from the watercourses. Then, in 1836, a variety of developments prompted both Chippewa leaders and American authorities to arrange the first of a series of land cession treaties. Among the Chippewa, the initiative came, significantly, from those along the upper Mississippi River, who with other bands were increasingly disturbed by declining income from the fur trade and were jealous of neighboring native peoples receiving annuities from the United States when they had none. Taking advantage of Joseph N. Nicollet's exploration of the Mississippi's headwaters, these Chippewa sent a delegation with this French astronomer-mathematician on his return to Fort Snelling. There Flat Mouth of the Pillager band near Leech Lake, the most prominent leader among the Mississippi bands, declaimed a list of their miseries and wants. Other tribes, including the Chippewa of Michigan, he complained to Agent Lawrence Taliaferro, "are doing better than us. They have treaties we hear, and they have goods and money. . . . We hear of treaties every day with

our Nation on the lakes and yet not a plug of tobacco reaches us on the Mississippi . . . we wish to know when we might have our expectations realized."[19]

Unknown to the Chippewa, American authorities were already moving to arrange a cession of portions of their lands. That February the Senate had directed the Executive Branch to arrange a purchase of tracts north of the Wisconsin River. Seen from Washington, the aim was to obtain control of the shores of Lake Michigan and the Upper Mississippi, both to make the whole course of that stream the "barrier" between Indians and the organized states and territories and to gain legitimate access to the vast pine forests of the region.[20] The latter represented a legislative response to the growing demand for pine lumber to build the proliferating new towns of the Mississippi Valley, a demand that had far outdistanced the supply of reasonably priced lumber shipped from western New York and Pennsylvania. Moreover, on the edges of the Chippewa's pine forests proper, a coterie of long-resident entrepreneurs, recognizing a profitable new market when they heard of it, were already maneuvering to obtain private control of these valuable Chippewa resources. These were the old-line principals in the fur trade, the heirs and assigns of the dismantled American Fur Company, as well as smaller independent traders, led by such notables as Hercules L. Dousman, Samuel C. Stambaugh, H.H. Sibley, William Aitken, and Alexis Bailey.

For a number of years, these experienced local residents had been exploiting their personal ties among the Chippewa and other tribes, obtaining from them leases for sawmill sites and timber cutting rights in "Indian

country."[21] Operating in the gray areas of Federal Indian law, their activities were scarcely slowed by an imperative directive from the Commissioner of Indian Affairs prohibiting such private contracts. In early 1837, the Commissioner dispatched a trusted investigator, Major Ethan Allen Hitchcock, to evaluate the situation. He reported that water-power sites and locations for dams and impoundments along the streams in the pinery region, vital for timbering, were few in number. Hence, unregulated, the American Fur Company's successors could quickly obtain exclusive control of timber resources, which would block broader development of the region. From Fort Snelling, Agent Taliaferro reinforced Hitchcock's reports, emphasizing – so he claimed – the opposition of these entrepreneurs to government interests and the growing antagonism of the Chippewa to them. Later, Wisconsin's territorial governor, Henry Dodge, expressed additional reasons for defining a serious threat in the efforts of this cabal: they were, he charged, loyal to British interest.[22] Thus, in addition to the concern with maintaining the government's ascendancy in managing Indians and the need to promote extraction of pine timber vital for regional development, two Jacksonian specters hovered over the preliminaries to the Chippewa's first land cession: the threats of private monopoly and of increased British incursions into the economy of the Northwest frontier. Underneath, however, the real threat was one of old-resident, locally influential individuals to the established Democratic patronage system, interests that threatened the flow of political benefits to the faithful.

In May, 1837, Governor Dodge received instructions for this first Lake Superior Chippewa land sale. Therein the Commissioner of Indian Affairs narrowly emphasized to him the importance of acquiring the pine lands but forbade recognition of any existing private leases for lumbering, which in the end only provoked a land-rush for key sites even before the treaty was ratified (Fig. 1).[23] Although a comprehensive national removal policy was then being implemented, no hint of such a provision was contained in these instructions or expressed during actual negotiations. On the contrary, Governor Dodge was directed to press for use of the proceeds for long-term local Chippewa social and economic development on their remaining lands in Wisconsin and Minnesota and to determine whether the western Chippewa bands would allow the United States to resettle the Ottawa and Chippewa of Michigan among them. From the perspective of Washington and the officials of Wisconsin Territory, there was yet no need to bring about the dislocation and westward "removal" of these Chippewa bands. Instead, they were expected eventually to resettle voluntarily among their kin to the north and west.[24]

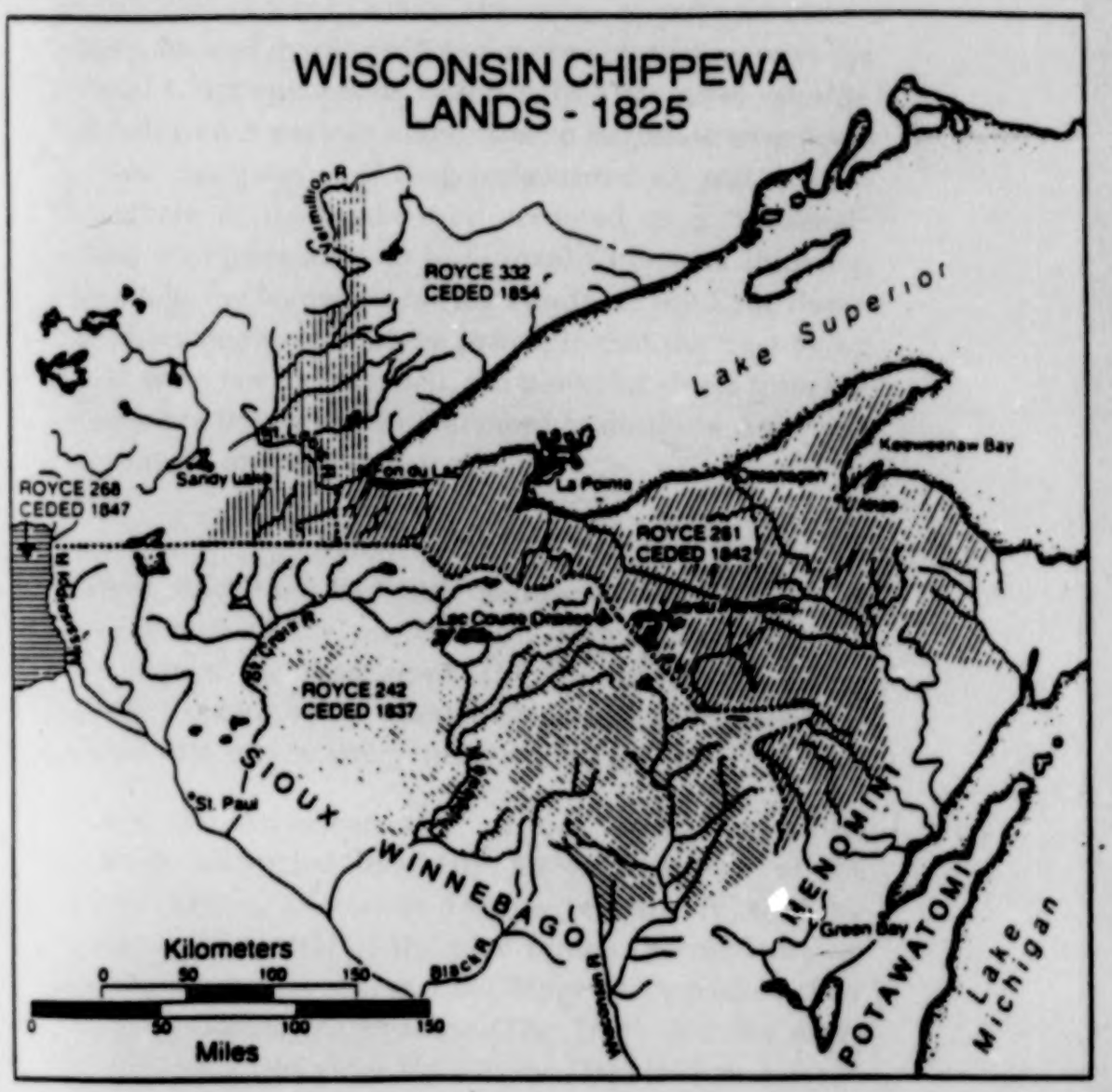
Practical arrangements for this parley created immediate and long-range problems. Since the Lake Superior Chippewa had been in an administrative never-never land (their villages were located between and remote from the Indian agencies at Sault Ste Marie and Fort Snelling), they had never been effectively served by any Indian agent.[25] The latter place was convenient to Governor Dodge's offices in Mineral Point, close to the Mississippi River traffic-way in extreme southwestern Wisconsin. But his selection of Fort Snelling as the treaty

grounds placed arrangements for the meeting in the energetic hands of Agent Taliaferro. Taliaferro was rarely slack in promoting the interests of Indians within his jurisdiction – in this instance the Chippewa bands of the Upper Mississippi – nor reluctant to thwart the influence of his rival at the Mackinac Island-Sault Ste Marie Agency, Henry R. Schoolcraft. Thus from the start, the Mississippi bands, only a small fraction of whose lands were involved in this negotiation, were administratively much favored.

[Picture Omitted In Printing]

The second cluster of Chippewa involved were from bands on the Lake Superior shoreline, and none of their lands were ceded that year. Lastly came the interior Wisconsin Chippewa of the Mississippi River's eastern watershed, whose lands were on the block that summer. These interior bands did not receive an official announcement of the treaty, and few of their leaders arrived at Fort Snelling in time to participate in or benefit immediately from the arrangements. This happened because neither of the two newly appointed sub-agents dispatched to carry word of the meetings – Miles M. Vineyard from Crow Wing above Fort Snelling and Daniel P. Bushnell from La Pointe – visited the interior Wisconsin bands. Indeed, a year later Bushnell still hardly knew the locations of the bands he served or the boundaries of his sub-agency.[26]

Although in earlier treaties the Chippewa had been identified as a "tribe," the treaty sought at the confluence of the Mississippi and St. Peter's rivers in July 1837, was



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negotiated with a new, American-conceived political-administrative fiction, the "Chippewa Nation." The use of "nation" did not denote any sense of political sovereignty. Instead it was used as a means of dealing with the several Chippewa bands collectively. This novel appellation allowed American authorities to negotiate with some of their delegates as if they represented all and to treat the whole of the lands they occupied as a "national" estate, a concept alien to traditional Chippewa thinking. But while the leaders from the bands on the Lake Superior shore demurred, on the principle that the tract being ceded were not theirs to sell, the powerful chiefs from the Mississippi bands made no attempt to disabuse American negotiators of this misconception.

[Picture Omitted In Printing]

Indeed, since they had little to lose and much to gain, they dominated the proceedings, intimidating their kin from east of the Mississippi. The few leaders from interior Wisconsin, whose lands were being disposed of, arrived late and scarcely raised their voices.[27]

On the American side of the conference table, although instructed to obtain an outright sale of the whole region, Governor Dodge repeatedly said he wanted only control of the pine forests. Recognizing an opening when they saw it, the Chippewa instructed their official speakers, Magegabow (The Trap) and the elder Bugonageshig (the elder Hole in the Day) in their reply.[28] On July 27, Magegabow, in flowery words embellished by symbolic gestures, tried to communicate the Mississippi bands' chiefs' interim negotiating position. The Chippewa, he proclaimed, would sell the particular lands

wanted by Americans, but they wished "to hold on to a tree where we get our living, & to reserve the streams where we go to drink the water that gives us life." The Secretary recording these debates, Verplanck Van Antwerp, was nonplussed, noting in the margin of the minutes, "This of course is nonsense . . . I present it to mean that the Indians wish to reserve the privilege of hunting, fishing, etc. on the lands." Clearly, this was not the American intention. Just as clearly, the Chippewa leaders understood their adversaries' aims of acquiring clear ownership of the whole tract.

Meanwhile, Magegabow continued, laying an oak bough on the table before Governor Dodge and saying, this is "the tree we wish to reserve. . . . It is a different kind of tree from the one you wish to get from us."[29] Although these Mississippi bands' spokesmen had no direct interest in the lands being sold, they were declaring their willingness to sell pinelands (useless to them) and their desire to reserve from the sale the deciduous forests and the waterways, which were of particular value to the interior Chippewa as the game-poor coniferous forests were not. Certainly the Mississippi bands' leaders understood the American aim to purchase the use and occupancy rights to the whole region outright, for the governor had repeatedly explained this both before and after Magegabow's speech. What they were doing was hedging, inserting a qualification into the official record, one they could later use to dodge undesirable ramifications of the agreement or to reopen negotiations.[30]

The participating Chippewa finally approved an outright sale of the whole tract. Notably, no mention of

removal from the lands was inserted into the agreement; neither had there been any discussion of this matter. Instead, the treaty awarded the Chippewa the temporary privilege of residing on and taking their subsistence from the habitat ceded, "during the pleasure of the President." With these words the Senate delegated to the executive branch the necessary authority to determine when, in the future, Chippewa rights to occupy and to exploit the pine lands should end. Certainly, the Chippewa, at the time, construed these expressions to mean a very long time. Since they could see few Americans in their lands and since it was to be years before their basic adaptations were much disturbed by aliens there, they had no reason to think otherwise. Indeed, American officials at the time expressed no definite ideas about when this privilege would be withdrawn.

However, an eyewitness to the negotiations recorded a foreboding judgement about the "pleasure of the President" phrasing, not about the timing, but about the way this privilege would ultimately be withdrawn. Writing to his superior in Boston, missionary W. T. Boutwell predicted "trouble with the Chipys. before five years should they attempt to remove them . . . the Inds. have no idea of leaving their country while they live – they know nothing of the duration of a man's pleasure."[31] An experienced observer of Chippewa ways, Boutwell was commenting on several social facts. The scattered, politically decentralized Chippewa, especially those in Wisconsin, would not feel themselves bound to contracts made by distant chiefs not their own, and they would likely resist a later order to abandon the ceded lands issued by any remote authority figure such as the President.

But so far as American authorities were concerned, a firm agreement had been reached: the lands wanted had been acquired by outright purchase, while continued Chippewa use of the area was impermanent. So, too, were realized certain of the "expectations" expressed by Flat Mouth the previous year. Those Chippewa at the treaty grounds received a modest amount of goods, and the bands later got the benefits of a substantial twenty-year term annuity. For a time the annual payments – whether goods or money – were shared among some of the constituent bands of the fictive "Chippewa nation," especially those from the Upper Mississippi and from interior Wisconsin. Although few of the latter had participated in the negotiations, after protesting the next year, they finally accepted the treaty's terms when assured they would share in these annual payments.[32]

The Lake Superior shoreline bands, however, by their own choice were excluded from the annual compensation. Nonetheless, a few of the latter were soon issuing complaints like those of Flat Mouth in 1836, expressing envy of those bands who were receiving payments from the United States and indicating a disposition to sell additional lands in exchange for annuities. Some American authorities, too, were concerned with this disparity, particularly because the lakeshore Chippewa still regularly visited British posts to receive "presents," stipends supposedly "5 times" greater than the annual per capita payments from the 1837 treaty.[33] Meanwhile, in the interior, the lumber rush was on. Hardly had the treaty been signed when the old resident entrepreneurs, whose maneuvers had helped precipitate the cession in the first place, flooded into the pine lands, there preempting

prime mill sites and timber tracts well before the treaty's ratification, land surveys, or public sales.

The resentments of Lake Superior-shore Chippewa were exacerbated by a decision reached by American authorities. Although the large, long established traders lobbied for Fort Snelling or – ominously – Sandy Lake, as the point of distribution for annuity goods, and while the Chippewa recipients themselves preferred several locations convenient to their villages, the Office of Indian Affairs fixed on La Pointe as the one place where the Chippewa had to gather yearly to take delivery of their treaty dividends. Therefore, for several years the lakeshore bands had to stand by and watch as those from the west and south assembled amidst them to receive payments. Certainly, significant parts of the goods and money delivered initially to the visiting Chippewa delegations quickly flowed, through long-established kin ties and reciprocal exchange networks, into the hands of the Lake Superior hosts. But this could not have satisfied the chiefs of the lakeshore villages, who witnessed their counterparts, especially the notably imperious and ostentatious leaders of the Mississippi bands, receive recognition and rewards denied to them. Thus more fuel was added to a growing discord, which soon pitted all Wisconsin Chippewa against those from the Upper Mississippi.[34]

However, at the time, no one recognized the truly hazardous economic transformation then emerging. For many decades, these Chippewa, as specialized winter trappers, had been involved in flexible, personalized, predictable exchange relationships with individual

traders. Now they were collectively dependent on a complex, ill-organized, impersonal federal appropriation-purchase-transportation-accounting-delivery system, a cumbersome arrangement that rarely brought payments due to a place on a date compatible with their own seasonal subsistence work. Over the next decade the Chippewa learned that this system seldom worked satisfactorily: long delays and interference in late fall wild-rice gathering and winter hunting, not to mention the costs of long distance travel to the payment grounds, were the rule. On the other hand, there were unanticipated benefits from the treaty. As the clear-cutting of pine forests progressed, the size of the ecotone – the pine forest-prairie "edge" where white-tailed deer flourished – was vastly increased. Since deer were the most desirable and the prime source of food for the interior Chippewa, as the size of the herds increased the subsistence value to them of the lands they had ceded was also enhanced. This ramification was precisely contrary to standing American preconceptions: that the advance of "civilization" would cause a decline of available game and the voluntary migration of the "primitive Indian hunter."[35]

Nonetheless, although the issue had not been raised during the 1837 negotiations or by the Senate in ratifying this accord, Indian removal was in the air, for the resettlement of Indians from other parts of the Old Northwest was then being pressed vigorously. In response to rumors of such dislocations and reactions from the Chippewa, local Indian agents regularly advised their supervisors that the Lake Superior Chippewa would resist this threat

with all means available to them. There was, simultaneously, little or no indication from neighboring citizens that moving the Chippewa was a desirable tactic.[36]

But these Chippewa had to cope with the real danger of treaty stipulated resettlement in the west during September, 1842. That month the same three clusters of bands that had negotiated the 1837 agreement gathered at La Pointe to debate a second cession, this one involving all remaining Chippewa territory in Wisconsin and Michigan's Upper Peninsula. Again the Americans sought, not agricultural lands, but control of a valuable natural resource, the copper-ore rich tracts along the Lake Superior shoreline.[37] The treaty dealings at La Pointe were in striking contrast to the 1837 council. At the earlier sessions, negotiations were, by the standards of the day, conducted in an open and aboveboard fashion, despite some manifest miscommunication and confusion. In 1842, the meetings provoked angry discord between opposed parties and a lasting controversy.

Before the final 1842 treaty document was signed, the chief American negotiator, Robert Stuart, had to engage in a variety of tricky tactical moves and coercive threats to force through an agreement. Moreover, to secure the consent of the parties most imperiled – Wisconsin's interior and the Wisconsin-Michigan Lake Superior Shoreline bands – he had to issue firm verbal commitments, explicit stipulations not written into the formal agreement. Stuart (long a senior agent of the American Fur Company, recently appointed to succeed Henry R. Schoolcraft as head of the Mackinac Superintendency) faced an unusually complex and contentious situation. In addition to his duty to the United States, he had firmly in mind the fiscal

needs of his former employer, John Jacob Astor. Moreover, he confronted an unruly assembly of diverse and generally opposed interests: old trading firms and newly established ones, several denominations of missionaries, mining entrepreneurs, the culturally marginal "half-breed" community, commercial fishermen, and – by no means the least divided or quarrelsome – the Chippewa themselves.[38]

The latter were now separating decisively into two divisions, those from the Upper Mississippi, and those who occupied the lands ceded in 1837 and the tracts to be sold at this meeting. Moreover, because control of the last of the Chippewa's Wisconsin lands was at issue, all involved were possessed of more than the usual windfall mania, which often stimulated dramatic confrontations at Indian treaty proceedings during this era.[38] Thus in October the parties gathered in a variously expectant, threatened, or angry mood. Most of them, "who otherwise before-time was but poor and needy, by these windfalls and unexpected cheats" eagerly anticipated obtaining some benefit, security if not wealth.[40] They milled about for days and nights eager to shake free of the great treaty tree – each in his own direction – some of its perennial fruits.

The instructions Stuart received from Commissioner Thomas H. Crawford were of a sort to vex or inflame most of these interest groups. He could allow no payment of traders' claims on the treaty grounds, a provision subsequently softened. Neither personal reservations for half-breeds or "friends" of the Indians, nor band reservations for the Lake Superior Chippewa were allowed. Most

important for the future of these Indians was the unyielding two-stage requirement for their dislocation and resettlement. Those Chippewa immediately affected offered no opposition to the first of these, the plan for their immediate abandonment of those particular tracts containing copper ore. Neither did they oppose the cession of nearly all their remaining lands. They demanded, however, several small band or community reservations, both within the area ceded in 1837 and the lakeshore region now on the table for disposition.

Stuart's instructions about the removal provision, however, were firm. The Chippewa would have now to agree one day to abandon the land sold and to resettle in the remaining "national" lands west of Lake Superior, that is, in the territory of the rivals, the Mississippi bands. But the Commissioner of Indian Affairs had stressed, and Stuart in council repeatedly emphasized, that this second step migration would not be required for a "considerable time," not until "policy" required the President to call for their relocation.[41]

On that issue – the timing of their resettlement – the fate of the negotiations hung. While Stuart readily disposed of the traders' demands and those of the half-breeds, the removal issue so threatened the Wisconsin bands that they resisted obstinately. It was then that Stuart resorted to a heavy-handed deception, claiming that the Chippewa had already ceded the mineral tracts in 1826, an allegation that the Chippewa delegates (and their American allies) denied. Ultimately, to obtain substantial support for the treaty from those nominally in control of the lands, he introduced a decision-making novelty – majority rule. The lakeshore and interior bands,

relying on the traditional requirement of a consensus, were thereby outmaneuvered. Unaffected by the cession or the removal provisions, and in line to reap yet more benefits at no cost to themselves, the eager chiefs of the Mississippi bands quickly gave Stuart their "votes." They had no more intention of welcoming the Wisconsin Chippewa into their lands than the latter had of moving there. For entirely different reasons, so, too, did the small Catholic and Methodist mission communities on the Keweenaw Peninsula cast their "votes" for Stuart's proposals. This minority of christianized Chippewa believed that they could avoid removal by becoming landowning, taxpaying, farming citizens of the State of Michigan.[42]

[Picture Omitted In Printing]

Even so the Wisconsin bands balked and protested. Stuart then inserted into the oral record a critical clarification and stipulation. Yes, he and the Chippewa soon agreed, they would immediately have to give up occupancy and use of the copper ore tracts proper. Additionally, some day in the future the President would likely require the Chippewa to abandon all the lands being ceded and to settle elsewhere. The question presented by the Chippewa chiefs was – when? In the distant future, replied Stuart. Be more specific, demanded the suspicious chiefs. Not during our lifetimes, nor those of your children, not for fifty to one hundred years, were Stuart's phrasings as recorded by different observers. Indeed, Stuart himself later repeatedly defended the rights of these Chippewa under such mutual understandings when others violated the explicit assurances this tough-minded Scot had publicly given.[43] Nonetheless, although most of the Wisconsin chiefs then capitulated,

several remained unbelievers and refused to place their marks on the treaty document. In this manner was created the basis for a later, prolonged, unresolved dispute over the meaning of the 1842 agreement, a controversy over the issue of timing of Chippewa removal, the first necessary ingredient for the trouble that erupted eight years later. This controversy raged over what the Chippewa and their supporters (including Stuart) saw as premature demands for these Indians to move. No further condition, such as the Chippewa's "continued good behavior," had been discussed during the debates over terms, nor was any such condition mentioned in the years immediately following.[44]

However, for more than a year before the 1842 treaty, a few key actors in Wisconsin Territory had regularly misinformed authorities in Washington to the effect that the Chippewa were eager both to cede their lands and to resettle west of Lake Superior. Together with his allies, Governor James D. Doty – who had strong personal and political interest in developing the new Northern Indian Territory in Minnesota and the Dakotas – was first among these promoters.[45] Superintendent Stuart, following his first visits to his new charges, particularly after his exertions in extracting a land cession agreement from them, knew better. When the few advocating Chippewa removal continued their efforts, Stuart stood in opposition, arguing he had personally and officially promised them no removal for many years. Of greater practical importance, he pointed out, there were no obvious incentives for the Chippewa to make this move, for they had ample supplies of fish, game, and wild rice in their present locations and were experiencing few problems with

the influx of Americans in the region.[46] In addition, the Wisconsin bands were by no means eager to settle among those on the Mississippi, who twice had been deployed against them to their disadvantage, especially because they knew that the remaining part of the "national" estate was an impoverished area.

Chippewa resistance to removal was reinforced because, as they understood the 1842 treaty, they could not be obligated to give up use and occupancy of the ceded lands for many years, and this construction as championed by numerous Americans directly familiar with its negotiation. Similarly, the tactics used against them in 1837 and 1842 negotiations had led to increased solidarity between Wisconsin's interior and lakeshore bands. Facing a common threat in the politically altered environment, they began responding with better coordinated opposition. Prompt organization of their dissent was imperative, for within a year following the treaty, new pressures developed for their immediate dislocation. Despite the early opposition of Superintendent Stuart, Commissioner of Indian Affairs Crawford, Governor Dodge, and others, who variously argued that immediate removal was against the spirit of the treaty expressed in explicit verbal stipulations or that it would not benefit the Chippewa, this pestering continued and increased in strength. Wisconsin Chippewa opposition came into clear and successful focus in 1847, when the United States made an abortive effort to secure the cession of the mineral-rich north shore of Lake Superior.[47] Knowing how much Americans valued control of that region, the Wisconsin Chippewa used as bargaining token their rights to this – for their economic purposes – barren landscape.

Without a treaty-guaranteed right to remain in Wisconsin, the Chippewa would have nothing to do with negotiations for the cession of the north shore, which they managed to block until 1854, when their demands for reservations were finally met.[48]

When efforts to talk the Chippewa into migration continued following the unsuccessful 1847 treaty councils, these communities stepped up their political opposition. Meanwhile, they proceeded along self-defined paths toward economic improvement in place, irrespective of what views American authorities held for their future. Then, in early August, 1847, Commissioner Medill signaled the preliminary designed for their removal. The La Pointe sub-agency was to be closed, its functions shifted west of the Mississippi to Crow Wing even if efforts to secure the north shore of Lake Superior were unsuccessful. In the latter instance, relocation of the La Pointe subagency and its services, so believed the Commissioner, would have the effect of luring some Wisconsin Chippewa west, easing the way for the removal of the remainder. Later Medill explained that government's plans for resettling all Wisconsin Chippewa that coming spring to R. Jones, Adjutant General of the Army. The Chippewa were not along in Medills design: the Menomini, Stockbridge, and those Winnebago still in Wisconsin (then near statehood) were also targeted, together with the Winnebago in the old "Neutral Ground" in the northeastern part of the new state of Iowa. Together, these several relocations were designed to clear Wisconsin, Iowa, and southern Minnesota of their remaining Indians, leaving a broad corridor open for American movement westward, between the existing Indian Territory southwest of the

Missouri River and a viable new Northern Indian Territory in north-central Minnesota.

While these distant plans were being laid, the Lake Superior Chippewa followed their own variegated agenda of economic adaptation. The 1842 treaty had added a second valuable term annuity to their annual income. Over the course of twenty-five years, they would share with the Mississippi bands yearly an additional $12,500 in coin, an equal amount in hard goods, rations, and consumables, and over $6,000 for their services of blacksmiths, farmers, teachers, and other artisans. But this was only a small fraction of their annual needs, so these Indians proceeded to make up the balance by their own enterprise. Fur-trapping continued to be of small importance, while on the lakeshore, Chippewa men were increasingly engaged in commercial fishing, either with their own equipment or as seasonal labor for Americans. As mining developed, numerous Chippewa men transported supplies, acted as guides, cut and supplied mine timber, or delivered venison and fish. Intensive gathering went on, and gardening increased, particularly of root crops; this was largely the work of women, who traded surplus vegetable foods and otherwise served the mining crews. In the interior, where the timber industry was expanding along the lower river valleys, similar changes in economic behavior occurred, attuned to the labor and material requirements of that extractive industry.[49]

Some few Chippewa, particularly those on the Keweenaw Peninsula, as well as at the Reverend L. H. Wheeler's experimental station at Bad River, even

approximated the old expectation of ill-informed American philanthropists by engaging in sometimes productive, male-managed, animal-powered small farming, although most others strongly resisted this novelty, risky at best in these latitudes. The substantial development, notably, lay in individual wage work and small-scale commercial enterprise, primarily in extractive industries, not in agriculture. But of greater long-range importance was the growing recognition among the local American population – most of whom were entrepreneurs, managers, or laborers, nearly all male, not under-capitalized small farmers with families seeking cheap land – that the Chippewa were delivering services and goods important to their enterprises. The Chippewa were creating tight social and economic bonds with potential allies in their immediate neighborhood.[50]

Thus, by early 1848 one necessary antecedent of a high stress, forced relocation was firmly in place: there was a prolonged, irresolvable dispute between Chippewa leaders and American national authorities over the right of the latter to demand and enforce abandonment of the ceded lands. Since Wisconsin's statehood was imminent and its laws would soon be extended over the area inhabited by the Chippewa, Commissioner Medill made a firm decision: they would have to leave. When rumors of government planning for this step reached the Chippewa they responded with a variety of political counter-moves. Some started asserting their "right" to reservations, claiming these had been promised during the 1842 negotiations.[51] But planning for relocation went on, with the 1849 establishment of Fort Gaines (in 1850, remained Fort Ripley) on the upper Mississippi, and the reshuffling of

agents and agencies aimed at concentrating the Chippewa on their remaining "national" lands in northern Minnesota. Chippewa opposition hardened as well, expressed in systematic lobbying in Wisconsin, Michigan, and Washington for the right to remain on small reserved parcels within the bounds of their old estate. A few on the Upper Peninsula, aided by their missionaries, started preempting and purchasing public lands, thereby acquiring the status of taxpaying citizens under state law.[52] Meanwhile, others sent delegations tc plead their case in Washington.[53]

The Chippewa delegations to the nation's capitol did not find an attentive reception, for throughout 1849 and 1850 Congress and President Taylor were preoccupied with larger issues such as incorporating the far West into the American state and the associated crisis regarding the extension of slavery in new territories. Nevertheless, despite the unconcern with the desires of several thousand Indians in an already established Free State, various political-administrative developments combined to create a national and a local context for what Methodist Missionary John H. Pitezel, an eyewitness on the Lake Superior scene, subsequently called a "chain of distressing evils."[54]

President Taylor's patronage sweep through the positions controlled by his office created the official team directly responsible for the Chippewa's winter disaster. Since the Indian Office had been transferred to the new Department of the Interior, relations with these Indians were brought under the supervision of a Taylor loyalist, Thomas Ewing of Ohio, a man more concerned with problems of the distant West than with those in northern

Wisconsin. Secretary Ewing, however, strongly favoring the trading firms, kept a firm grip on the details of managing the Indian business, causing the new Commissioner, the Kentucky Whig Orlando Brown, much frustration. The third member of the administrative chain responsible for arranging the attempt to move the Chippewa out of Wisconsin was the Pennsylvania Whig, Alexander Ramsey, who in March 1949, was appointed Governor and Superintendent of Indian Affairs in the newly formed Minnesota Territory. This trio had little experience in the management of relations with Indians, but the team was not yet complete. It was awaiting its fourth, junior but key, member, Sub-Agent John S. Watrous.[55]

Until this time, their relocation of the Lake Superior Chippewa had been little more than an administrative intention; no specific mechanism for accomplishing this aim had been created. Neither had there been an immediate impetus for translating thoughts into deeds. Excepting the Lake Superior shoreline and the river valleys traversing the pine lands, most of the ceded Chippewa lands were entirely unpopulated by Americans. The fact that the Americans residing nearby were almost entirely male likely reduced rather than increased local support for removal however, there was simply too little "settlement" anywhere to create local "pressure" for removal.[56] In addition, although they adamantly held to their right to remain in Wisconsin, the Chippewa had not forced the dispute to a confrontation point. Instead, still holding title to the north shore mineral lands, they remained

pacific and reasonable, employing lobbying and bargaining tactics, seeking approval for reservations within their old estate.

The thrust, but not an explicit mechanism of Chippewa removal, derived from the appointment of Governor Ramsey, who was the titular head of the Whig party in Minnesota Territory as well as Governor. Being one of the few Whigs in a frontier Democratic stronghold and expected to deliver economic favors to party loyalists, his position in this new Territory was particularly difficult. Thus, concerned with patronage and with establishing a firm presence in his new office, when counseled by a powerful Minnesota trader, H. H. Sibley, Ramsey could see that the Wisconsin Chippewa presented an opportunity. Obtaining their removal meant also transferring their large annual annuities and the numerous salaried jobs associated with their management into his superintendency. As well as moving an important patronage resource out of a Democratic state into his hands, the resettlement would also have meant a policy coup, a major step toward rejuvenating the floundering plans for a Northern Indian Territory.[57]

The April 22, 1850, appointment of John S. Watrous as the new Chippewa sub-agent added a critical figure, a man with at least some experience in the region and among these Indians, and one with a profound vested interest in seeing them dislodged. Originally from Ashtabula, Ohio, Watrous had arrived at La Pointe in 1847 hoping to make his fortune in the Indian trade, in which he was unsuccessful. Something of a political chameleon, in early April he left his desk in the Wisconsin State Assembly – where he had briefly served a Democrat

constituency in the northwestern part of the state – to travel east in search of greater opportunity, likely drawn there by news of the Presidential order revoking the Chippewa's 1837 and 1842 treaty privileges. In Washington he presented himself to influential friends of his family as a staunch Ohio Whig and as a man experienced in his dealing with the Chippewa.[58]

Watrous was a man with plans – for himself and for dispossessing these Indians. He was soon dispatched to his new post carrying Commissioner Brown's official, public orders to bring about the immediate movement of the sub-agency into Minnesota Territory, as well as a covert scheme for dislodging the reluctant, wary Chippewa. Thus was combined an ongoing dispute over a treaty and several influential local actors – men with vested interests in securing a removal. A potential disaster lay waiting only the major confrontation that the Chippewa had been avoiding. Guided and supported by his superiors in the administrative hierarchy, particularly by Governor Ramsey, Watrous soon manufactured this confrontation.[59]

The public version of these plans specified a summer, 1850, timing for the relocation. However, aside from closing down the sub-agency's operations in Wisconsin and Michigan's Upper Peninsula, Watrous did little to bring about the move that early. Indeed, there is no suggestion anyone believed the Chippewa would cooperate had such an attempt been made.[60] Aside from Ewing, Brown, Ramsey, and Watrous, few if any others knew of the covert, contingency design, timed for a tricky, hazardous,

early winter dislocation. In any respect, news of the president's executive order withdrawing the privilege of occupying the ceded lands spread rapidly, and the reaction was equally swift. While the Chippewa and their American allies began mobilizing for political resistance, there was also much demoralization. Of those who had been farming, many would not plant crops that spring; many more spent long periods in councils debating how to avoid resettlement. The time and energy spent in political agitation and the wasted economic inactivity resulted in decreased food production that summer and fall. The Chippewa became even more dependent on government rations, which contributed to the winter debacle.

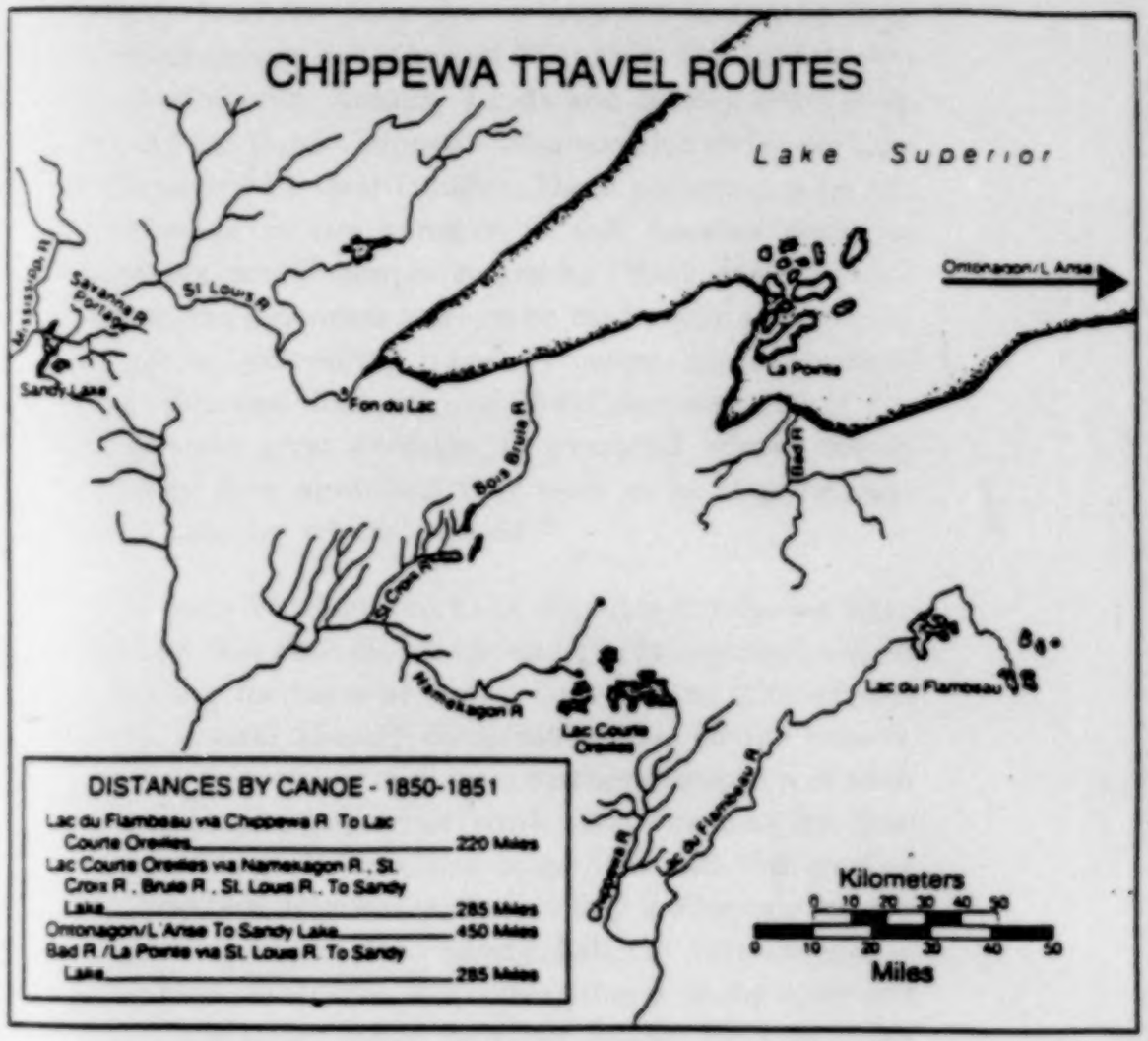
Protestant and Catholic missionaries associated with the Indians were divided in their reactions. Being largely dependent on federal funds for their operations, they had to tread lightly; the position most commonly expressed was one of ambivalent neutrality, and none rose to a heroic defense of the Chippewa. On the one hand, they deferred to presidential authority; on the other, they had to consider what they saw as their responsibilities to the Chippewa, which were, mainly, to see to the future of themselves and their schools and missions among the Indians. Most commonly, while not actively supporting or opposing relocation, they would not counsel the Indians to move or stay.[61] In the end, only a few became active advocates of resettlement. The Reverend Sherman Hall at La Pointe was one. Soon after taking office, Watrous acquired Hall's loyalty with the promise of an important job at the proposed new Indian boarding school in Minnesota.[62]

However hesitantly, soon some missionaries quietly began aiding the Chippewa in framing their petitions and helping to mobilize help from other Americans in the region. One active and effective supporter was Cyrus Mendenhall, a mining entrepreneur associated with the Methodist Episcopal Mission Society, who on an inspection trip along the Lake Superior shore in June, 1850, circulated a memorial among Americans calling for the recall of the removal order. Most merchants, mine foremen, lumbermen, and other influential citizens between Sault Ste Marie and La Pointe responded to Mendenhall's appeal, which was subsequently delivered to Congress and officials in Washington. Mendenhall kept up the pressure and was soon joined by the Reverend S. B. Treat (Secretary of the American Board of Commissioners for Foreign Missions). Their lobbying effort grew in force and did not end until after removal order was withdrawn two years later.

Indeed, from the start there was no evidence of local public support for the Chippewa's removal. Regional newspapers, echoing and reinforcing the sentiments of their readers, regularly criticized the President's order and both the motives for and the tactics employed in efforts to implement it. Sault Ste Marie's *Lake Superior News and Mining Journal* was consistently strident in its support of the Chippewa, and its editorials and news clips were picked up and reprinted throughout the Great Lakes area. The Chippewa even made the news in Boston, when one of their delegations passed through on its way to Washington. The fact that the whole region occupied by the Chippewa was strongly Democratic did not aid the Taylor administration in its efforts to dispossess them.[63]

Meanwhile, Sub-Agent Watrous worked at implementing the public version of his orders. He first conducted an inspection tour of Sandy Lake (Fig. 2), the new site where the Chippewa annuities were to be distributed. There he began arranging his own future as well, at that profitable intersection between private enterprise and public business. He established a mutually promising relationship with the agents of Chouteau and Company, the St. Louis firm that dominated trade in that area, and with potential contractors, suppliers, and transportation firms in St. Paul. By the end of July, 1850, he enjoyed a freedom of action greater than most Indian agents, for three key figures at the top of the Whig political hierarchy and national administration were gone, with the death of President Taylor and the resignations of Secretary Ewing and Commissioner Brown. Meanwhile, Congress was violently debating the Great Compromise, not mundane domestic matters such as the Indian Appropriation Bill. Thus an unanticipated ingredient was added to Watrous's covert plan – whatever he did or abstained from doing, the vital Chippewa annuity money would certainly be dangerously late in arriving. At the same time, the Chippewa were celebrating what seemed to them a success. Watrous had led them to believe that they had only to come to Sandy Lake – 285 to 485 difficult canoe and portage miles to the west – to receive their annuities. Some Chippewa determined to do this, while all understood that they could for many years remain in Wisconsin even if it meant giving up the treaty specified annuities and local services of blacksmiths and farmers.[64]

These Indians and local citizens had no inkling that, earlier in the year, Commissioner Brown had sent Governor Ramsey a different set of orders and a plan, which



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Watrous, if not himself its principal architect, was certainly aware of before he left Washington in late April. This plan was never made public, allowing Ramsey and Watrous later to deny that a removal had ever been intended during the winter of 1850-1851. The scheme was straight-forward. Annuity goods and money were to be paid only to those Chippewa who traveled to Sandy Lake accompanied by their families. These payments were not to be made in late summer or fall, because then the Chippewa would simply return to "their own haunts." Instead, the payments were to be made only after winter had set in, preventing travel by canoe. Someone, most likely Watrous, had advised the Commissioner of the Chippewa's great aversion to overland winter travel. Lured by their annuities, they were to be trapped near Sandy Lake by winter's freeze.[65]

In early October, the Lake Superior Chippewa were informed that both their cash and goods annuities would be waiting for them at Sandy Lake on the 25th of that month, a date already dangerously late in the season, which guaranteed at minimum further disruption of their own seasonal subsistence work. Watrous had by then obtained the goods specified in the 1837 and 1842 treaties and had them, together with a grossly inadequate supply of rations, delivered to Sandy Lake at extraordinarily high prices. Since the new sub-agency's farms were not yet in operation, there were no public food supplies stored at that remote location. Thus, once the Chippewa received their money annuities, they were heavily dependent for basics on purchases from the local traders, since the marshy Sandy Lake region, as well as the route going and coming, were notoriously deficient in game. This

deficiency was exacerbated when the upper Mississippi flooded that season, inundating the crude structures where the supplies of both the government and the private traders were stored, spoiling the inadequate amounts of flour and salt port available, and destroying the local wild rice crop. To compound these sources of nutritional stress, the Lake Superior shoreline Chippewa had a poor fishing season earlier that year and had already experienced grave food shortages.[66]

Constructed in this manner by several key actors with personal and political goals overriding any concern they may have had for their charges, with an assist from uncontrollable natural and institutional events, a tragedy lay in waiting for those Chippewa electing to hazard the long trip to Sandy Lake. Not all the Lake Superior Chippewa accepted the high risks they could see in this dangerous edge-of-winter journey. The bands at L'Anse, Ontonagon, Pelican Lake, and La Vieux Desert refused entirely. Those from the headwaters of the Wisconsin River sent but two men, and the villages on the Chippewa River drainage somewhat more. More came from the La Pointe area villages, but in all these instances the Chippewa took precautions. Ignoring orders to bring their families, they dispatched mainly adult males. Apparently, only from those villages closest to Sandy Lake, on Lake Superior's north shore and on the upper Mississippi, did some family groups make the journey. Moreover, intending to pack the annuity goods for their communities home by canoe and on their backs, these delegations traveled light, without the rolls of birchbark and woven mats needed to sheath temporary wigwams,

many even without their firearms. These decisions further contributed to the physiological stress they experienced over the next three winter months.[67]

Those Chippewa bands who sent delegations to collect their annuities coordinated their travel plans. Coming by different routes, they assembled at Fond du Lac before pressing up the difficult portages along the St. Louis River, and then via the Savanna portage to the marsh and bogs surrounding Sandy Lake. Exactly how many made the trip is uncertain. If was likely fewer than 3,000, the figure Watrous later used in boasting of how many he had "removed" that winter. Earlier, he claimed 4,000 had assembled by November 10, but this number included some 1,500 from the Mississippi and Pillager bands, present to collect their annuities, not to be resettled. Watrous never provided his superiors with careful counts or lists of those who arrived, for once confronted with the disaster his actions had caused and the great hostility of the assembled Chippewa, he distributed the remaining putrefying rations and the other goods from the flooded warehouses to those present, disregarding his orders to deliver only to family groups.[68]

Those Lake Superior Chippewa hazarding this journey began arriving at Sandy Lake in mid-October. They discovered Watrous gone and no one present authorized to parcel out the goods waiting for them; he was on his way to St. Louis supposedly to collect the more valuable annuity money. Soon the suffering began – from illness, hunger, and exposure. The sojourners lacked shelter, and most of the scanty supply of spoiled government rations

were quickly consumed, leading to an epidemic of dysentery so incapacitating and deadly that American witnesses were certain it was cholera. This was soon accompanied by an epidemic of measles, which further contributed to high rates of illness and fatalities. The Chippewa were concentrated in an unsanitary, waterlogged area, with few natural food supplies available. While they lacked shelter and medical services, were unable to collect their goods, waited day-to-day for the arrival of Watrous to bring their critically needed money payments and to open the warehouses, the Chippewa's health and energy were increasingly sapped by hunger, infectious diseases, and the winter now on them. If some of these components had been absent, they might have scattered, reducing the rate of reinfection. As it was American witnesses reported that on many days there were eight or nine deaths, so many that the few who were well could not inter the corpses properly.[69]

Watrous saw only the last days of this calamity, for he was absent from his post until November 24, a month later than the promised payment date that had lured the Chippewa west. After sending messages for the Chippewa to assemble, on October 6 he left for St. Louis and arrived there on the 21st, four days before the scheduled payment, then at least two weeks hard travel to the north. In St. Louis he soon learned that no funds had arrived and none were expected that year, information he could easily have anticipated while yet in St. Paul, for the national political crisis had so stalled Congress that for months little attention was given ordinary domestic matters. The Appropriation Bill providing funds for the Chippewa's annuities did not pass until November 12,

much too late in the year for the required physical delivery of the specie to such a remote location. Watrous on October 26 finally took passage on a steamer for his return trip, but the vessel was delayed, and he did not arrive at St. Paul until November 13. There he tarried two more days, attending to his own business, mainly pleading to obtain an upgrading of his Sub-Agency and a promotion for himself. He did not leave St. Paul until the 15th, and then the onset of winter forced him to abandon his canoe and travel on foot overland, an ill augury for the sick, starving Chippewa at Sandy Lake, who had been waiting six weeks for their goods and money.[70]

The major unanticipated institutional ingredient adding to the scale of the disaster organized by Brown, Ramsey, and Watrous was the failure of Congress to appropriate funds for the Indian Department in a timely fashion. Without hard cash to purchase necessaries for the winter, the Chippewa – who in addition to the epidemic illness, great loss of life, and their general debilitation had lost an entire season's subsistence production – were in even more desperate condition. However, on arriving at Sandy Lake on the 24th and seeing the consequences of his scheme, Watrous set to work cutting his administrative losses. The idea of trying to keep these sick, starving Chippewa near the Mississippi was swiftly dropped. He then did what little he could to relieve their "pinching wants." After much wrangling over who would be responsible for the unauthorized expenditure, he persuaded the traders to deliver a small quantity of ammunition at a highly inflated cost to the Chippewa for subsistence hunting on their way home. Similarly, he drew up arrangements for the traders to deliver to the

Chippewa from their stores $8,368.40 in provisions, and advance against their yet unpaid cash annuity, at what he claimed were "the most reasonable terms possible." The terms were in fact extraordinary, three to six times those of prices at St. Paul and other nearby depots. By Governor Ramsey's own estimates, this amount was barely three days supply of food, entirely insufficient for the Chippewa's arduous return trip.[71]

Finally, on December 3, with winter fully on them, when their scanty rations and goods were at last in their hands, the encampments broke up. The Chippewa left immediately, abandoning two hundred sick and a few well adults to care for them. By then more than a foot of snow lay on the ground and the streams were frozen over, preventing the use of canoes, which the Wisconsin Chippewa jettisoned along the St. Louis River or scrapped to be used as fuel for the frigid nights. Then they set off on foot along the frozen trails eastward, heavily laden with the goods for their families. By the Chippewa's own reckoning, many more died on the trails home than had died at Sandy Lake.[72]

The total mortality for this whole sorry episode cannot be determined exactly. Watrous, himself, although sometimes claiming reports of epidemics and starvation were exaggerated, admitted that more than 150 had died at Sandy Lake proper, including twenty of those left in his charge after the Chippewa departed. About two hundred was the estimate of several missionaries present part of the time at the new Sub-Agency during these events, while William W. Warren, a month after the goods distribution, reported that nearly two hundred died at Sandy Lake alone. But the best enumerations were likely those

of the Chippewa leaders themselves, for they were totaling up their own deceased kin. Two separate reports from them, one from the elder Psheke (Buffalo) and his fellow leaders at La Pointe in November, 1851, and a second from the interior Wisconsin leaders a year later, agreed that 170 died during the time spent waiting at Sandy Lake, with another 230 dying on the return trip. Most of these were adults, mainly able-bodied men, an especially hard blow to these small populations. Thus, of the population at risk, something less than three thousand, the Ewing-Brown-Ramsey-Watrous plan to lure the Lake Superior Chippewa west and trap them there successfully removed some twelve per cent, by killing them. The human loss was one thing: In addition the Chippewa also lost much capital equipment (their canoes), much critical subsistence work and other productive economic activity, and they went further into debt, when they were forced to encumber unpaid and future annuity funds for survival rations.[73]

After returning to their homes, the Chippewa were even more determined to avoid removal. Neither would they at any time of the year so much as visit Sandy Lake, which they now defined as a "graveyard." Once information of the winter's carnage became public, Watrous came under sharp, continuing attack from the Chippewa and their now numerous supporters. Missionary groups, regional newspapers, and local citizens led the opposition, and the legislatures of Wisconsin and Minnesota aided, while the Chippewa themselves began organizing a series of memorials and delegations to Governor Ramsey and to Washington. Within six months the new

Commissioner of Indian Affairs, Luke Lea, and the Secretary of the Interior responded to this lobbying effort, seemingly in favor of the Chippewa.

On August 25, 1851, the Secretary issued instructions apparently rescinding the 1850 removal order. Transmitted to Watrous by telegraph, this information became immediate public knowledge, spread by the *Lake Superior News* in an account highly favorable to the Chippewa. A few weeks later, leaders from the La Pointe and other bands traveled to Sault Ste Marie for a grand "Indian Jubilee" celebrating their victory. The rejoicing was premature. Although the removal order itself was publicly withdrawn, actual efforts to accomplish this goal were not ended; for the requirement that annuities be paid only to Chippewa in the west remained in force, and Agent Watrous continued determined efforts to dislodge them on an even larger scale than earlier.[74]

Backed by Governor Ramsey, Watrous had begun active, large-scale removal operations early in the year, and these continued through 1851 and 1852 irrespective of publicized instructions from Washington. Recognizing that the Chippewa would have nothing to do with Sandy Lake, Watrous selected Crow Wing and Fond du Lac as destinations more likely acceptable to them. He marshalled his forces, employed more personnel, placed influential marginals such as William W. Warren and missionaries such as W. L. Boutwell on his payroll, stockpiled resources, let contracts, issued assembly orders, called for troops to aid his work (which were refused), and scurried around the region working to lure the Chippewa out of their ceded territory, all the while affecting to

keep his plans secret from the Chippewa and their American allies.

The one major incentive Watrous had was the annuity fund, now doubled because of the accumulation of 1850 and 1851 installments. To increase the pressure he refused payment in Wisconsin to any subdivision of the Chippewa: Pagan, Christian, Successful Farmer, New Land Owner, Half-Breed, Lake Shore Fisherman, Interior Hunter, whatever. And in autumn, 1851, he made plain that he still favored the same deception plan and tactics that had proved so disastrous a year earlier. "It is my intention," he reported to Ramsey on September 22, "to delay (unless otherwise instructed) making the moneyed payment of the present year to the Chippewas of Lake Superior until after navigation ceases, which is done to throw every obstacle in the way of their returning to their old homes." The governor did not otherwise instruct.[75]

However, in spite of all the preparations and expenditures, most Chippewa would have nothing to do with these plans. Many traveled to Fond du Lac or Crow Wing that fall; after obtaining their annuities, few tarried to experience a repeat of the previous year's debacle. Nonetheless, the newly promoted Agent Watrous proclaimed near total success, reporting that only seven hundred Chippewa remained in the east subject to later removal. His reports were seconded by Governor Ramsey, who also professed victory in his Annual Report. Both were dissembling, as local citizens, employees of the removal effort, missionaries, the newspapers, and the Indians

themselves well knew. The Wisconsin and Upper Peninsula Chippewa remained within their old band territories, irrespective of the change in their status caused by Wisconsin's statehood and the cession of their lands.[76]

These attempts to dislodge the Lake Superior Chippewa continued through 1852, but with diminishing effect. As the protests of the Chippewa and their allies grew in volume, the evidence of costly failures mounted, a final delegation to Washington at last produced success. Following a meeting of old Psheke from La Pointe with the President in late June, 1852, when another petition from the citizens of the Lake Superior shore was presented, Millard Fillmore finally cancelled the removal authorization entirely. Of even greater value to the Chippewa, the President now approved the payment of back, current, and future annuities at La Pointe. The Chippewa victory was complete two years later. Then, after a Democratic President had taken power in Washington, a new Commissioner of Indian Affairs, George W. Manypenny, dismantled the old Indian removal policy and installed a new program emphasizing concentration on reservations and economic development in place. On September 30, 1854, the Lake Superior Chippewa signed their last treaty with the United States, one severing relationships with the Mississippi bands, and guaranteeing them the right to reside on and take their subsistence from reservations within the environments they had long inhabited.[77]

Forty years ago, in the first attempt to find order in the implementation of the removal policy among the Indians of the Old Northwest, Grant Foreman concluded that their resettlement was, "haphazard, not coordinated, and wholly unsystematized," and further asserted that

the whole period for these peoples was characterized by no patterns.[78] But if we plot the different responses of all Old Northwest Indian societies to the removal policy against the basic forms of their adaptations to broad biotic zones, their different types of social organization, and the paths and various goals of American intrusions into their lands, a clear matrix emerges. This underlying pattern yields a near mutually exclusive distribution of those Indian communities that did resettle in the western Indian Territory against those that did not. By placing their activities into a broader social context, this pattern also helps to make understandable the Chippewa's resistance to relocation.

The Chippewa of Michigan's Upper Peninsula and Wisconsin were by no means alone in their successful resistance to this American inspired and commanded resettlement program. Despite repeated efforts running over many years, the federal authorities entirely failed in efforts to dislodge any of the nature societies in the Great Lakes region similar to these Chippewa in basic social organization, technology, subsistence economy, environmental adaptation, and culture.

Those Old Northwest Indians whose assessments of the removal policy were most strongly negative were foraging peoples, dependent on hunting, fishing, and gathering for their subsistence, while they exchanged for manufactured goods and money the same products needed for their own sustenance. They inhabited biotic zones characterized by numerous streams, marshes, and lakes, with long, harsh winters and extensive deciduous and coniferous forests. They were also skilled builders

and users of framed-up bark canoes, their main means of transportation. And their direct contacts and experience with the western prairie lands were few or none.[79]

Thus, the Lake Superior Chippewa's success in thwarting implementation of the removal policy was true also of extensive populations of other Chippewa communities, and the Menomini, Ottawa, and those Potawatomi villages on the Lake Michigan shore above present Milwaukee. Organized as small, autonomous bands, these native peoples had maintained their political, social, cultural, and religious integrity to a degree well beyond those of Ohio, Indiana, and Illinois. Moreover, throughout the era these Old Northwest Indians were not surrounded by Americans, agriculturalists or otherwise. Hence they and Americans were not immediately in open competition for the resources of the same environments. These foraging bands, confidently following their own cultural and adaptational trajectories, recognized no advantage in westward migration away from habitats familiar to them. Instead, they defined this possibility as greatly damaging to their welfare. Indeed, several thousand Indians from these communities, when faced with the prospect of closer dealings with Americans and their authorities, did voluntarily abandon their lands in the United States. But these slipped across the international border into Canada and resettled in locations similar in climate, flora, and fauna to those they had abandoned.[80]

To the south an entirely different pattern of Indian responses to the removal policy emerged. In striking contrast to the reactions of the foraging bands in the northern reaches of the Old Northwest, when the era closed all the Indians there – with some few exceptions – had been

dislocated and resettled in the west. These were multi-community tribal societies such as the Shawnee, Delaware, Wyandot, Kickapoo, and Sauk. They occupied habitats characterized by relatively long growing seasons, prairie and parklands, fertile bottom lands, and hardwood forests. They lived in large, semi-permanent villages, and their traditional economies had been based on a mix of intensive horticulture and large-game hunting.[81]

Moreover, well before the removal era began in 1825 they had been forced to adapt to a new environmental reality: large numbers of American farmers, merchants, entrepreneurs, and developers were a significant and threatening part of their milieu. Occupying the ground directly in the path of the post-Revolutionary frontier, for decades their relations with these newcomers had been marked by intense, open rivalries, for they were involved in sometimes violent competition for the same environmental resources. Thus they had long been involved in land cessions. Some, like the Mdewakanton in 1837, had more or less eagerly exchanged less critical portions of their estates for goods, immediate cash payments, and annuities. Others had been driven to such sales by intense pressures from appointed negotiators and other interested parties. Understandably, the effects of the removal policy fell on them earlier and heavier than on the northern foragers like the Chippewa. Indeed, the first treaties with any Indians – either of the Old Northwest or the Southeast – to be impelled by and obtained under the specific terms of the 1830 Removal Act were negotiated with several such communities in Ohio.[82]

These farming, large-gaming hunting tribal societies of the Old Northwest's prairie lands were also distinct

from the foraging bands to the north in another salient characteristic. While the foragers remained committed to bark canoe transport, those to the south had long since abandoned such frail vessels in favor of horses. Indeed, twenty years before Thomas Jefferson conceived of using the newly acquired Louisiana Territory as a suitably distand [sic] homeland for Indians, numerous Shawnee, and Delaware, followed by lesser numbers of Kickapoo, Ilini, and Potawatomi, had used their new means of travel voluntarily to abandon their land in the Old Northwest and resettle in Missouri and Arkansas, with some going as far west as Texas.[83] Since horses facilitated East-West movement of people and goods across the valleys of the great midcontinent river systems, even those who stayed in the remains of their old tribal estates were enabled to add seasonal horse-nomadism for purposes of hunting, trade, diplomacy, and war to their technological inventory. Oriented to large game hunting from the start, when they faced increased competition with Americans near their lands, they used horses to bring the resources of the western environments within their reach.

Hence, by 1825 not only were many from these prairie tribes familiar with the western environments, but several related pioneer Indian communities were already well established there. Indeed, through the 1830s, emissaries from such western trail breakers often visited their kin in Ohio, Illinois, and Indiana, soliciting new recruits and allies.[84] The Lake Superior Chippewa, and other bark canoe-using foragers of the north, had no such experiences, technological capacity, relationships, or inclinations.

There were some few exceptions to this general dislocation and westward resettlement of the prairie tribes. These included some hundreds of Indiana Miami and fewer Michigan Potawatomi who were allowed, by negotiated treaty right, to remain on small parcels in their old environments.[85] Then there were the many who escaped the full consequences of American policy by resettling in British territory. These included numerous horse-nomadic Potawatomi, Ohio Ottawa, and others who settled on the Ontario Peninsula. Making appropriate ecological choices, these voluntary emigrants selected locations south of the Canadian Shield region, in habitats and a climate like those familiar to them. These immigrants studiously avoided British efforts to concentrate on the – to them – barren landscape of Manitoulin Island, further demonstrating the significance of both environmental adaptations and the capacity of Old Northwest Indians to bend the policies of powerful states to their own wants and ends.[86]

More recently than Foreman, Prucha, stressing the extensive prior moves of the Old Northwest's native peoples, concluded that "the emigration of these tribes in the Jacksonian era was part of their migration history.[87] Such an interpretation places the most charitable interpretation conceivable on this American policy, but it does not distinguish one type of migration from another; neither does it look far beneath the surface appearances of events. Such an interpretation is rather like concluding that the experience of Japanese-Americans between 1942 and 1946 may be adequately explained as part of their prior migration history as well.

In a larger historical perspective, none of the Great Lakes-Ohio Valley Indian societies had ever experienced a program quite like the American removal policy as arranged and conducted in the years after 1825. Some, such as the Ontario Iroquoian and Michigan's Algonquian horticultural tribes, during the second half of the seventeenth century had been refugees, fleeing the ravages of war, pestilence, and starvation. Many had sometimes responded to the incentives offered by French or British traders and officials in selecting sites for new settlements. For more, including the Chippewa, their earlier migrations were in response to internal stresses such as population increase, intra-community conflict, resource depletion, or a particularly successful adaptation to new technologies and economic opportunities. Such relocations were generally voluntary, even if encouraged by inducements from European colonial officials, not forced. None of the Indian communities in this region had, until the mid-1820s, collided with a rapidly expanding nation-state bent on fueling its own internal development by the whole-sale expropriation of resources and dispossession and dislocation of native inhabitants. The fact that in some instances the goals of particular Old Northwest Indian communities converged with the policies of the United States does not distract from this conclusion. It demonstrates merely that these Indians were adaptable enough to hunt out new opportunities in an unmapped thicket of adversity.

"Settlement pressure" is the most popular, widespread and persistent explanation of the timing or the sequence of efforts at implementing the removal policy.[88]

However, as a single-factor explanation this will do neither for the examples of the Chippewa and neighboring foraging bands nor for Old Northwest Indians generally. For at the moment the four American officials conceived their plan to deceive and dislodge the Lake Superior Chippewa, there were few or no Americans "pressing" on their lands. Nor were there many for decades thereafter. Indeed, as witnessed, these Indians found many staunch supporters among the small populations of neighboring citizens. Similarly, had the density of neighboring American population been the major cause of removals, then the perennially reluctant Wyandot of northwest Ohio would have been forcibly transported west at least a decade before their 1843 capitulation and resettlement. "Settlement pressure," perhaps phrased better as significant competition between Americans and Indians for the latter's environmental resources, helps explain how and when Indians were pressured to cede land. By itself it does not explain the drive to move them to distant locations.

Recognizing this distinction – between the acquisition of Indian land and their planned resettlement in distant places – also requires distinguishing the manifest from the less well-recognized functions of the removal policy after 1825. Doing so helps us better understand not only this extraordinary Chippewa case, but efforts to implement this policy among other Old Northwest Indians generally. For decades before 1825, the overt business of acquiring Indian rights to occupy and use the resources of land had been commonly accomplished without necessarily demanding or forcing resettlement in remote locations, certainly not so to an area officially

demarked as an exclusive "Indian Territory." Frequently, this was achieved by acquisition of most or nearly all of an Indian society's land, leaving them to concentrate on the remaining parcels of their old estates. Indeed, this was the explicit intention spelled out in the Chippewa's 1837 treaty, not the requirement that they resettle in the west. Moreover, when this planned resettlement policy was finally succeeded by its replacement (the reservation policy), substantial populations of near or entirely landless Indians remained in Michigan and Wisconsin, with smaller groups in Ohio and Indiana, as well as throughout the eastern United States. This did not cause an appreciable slowing of the populating or economic development of these regions. Before and after the years when a comprehensive, nationwide removal policy was in effect, indeed, even between 1825 and the early 1850s, Americans pressing on Indian environments acquired titles to and control of most Indian land without demanding resettlement in a designated all-Indian Territory.

The Chippewa's experiences between 1842 and 1852 forces our attention to a different issue, the understory of the drive to relocate Indians in the west, and to additional conclusions. Whatever the much idealized rationalizations of the Jefferson, Monroe, Adams, and Jackson administrations about the goals of Indian removal, well before 1842 – and especially so before the disastrous winter of 1850-1851 – the transportation and resettlement of eastern Indians under the ideological guise of benevolent public policy had acquired an institutional life of its own. In the business of collecting, uprooting, transporting, and subsisting Indians, numerous public officials and private citizens discovered incentives and rewards.

Removing Indians was often made to serve neither the declared wants, the assessed needs or the passions of neighboring citizens, nor the long range values of a nation. It served, rather, the imperatives of the American state and specifically the narrow political-economic patronage concerns of whatever administration was in power.

In the instance of the abortive effort to dislodge and to resettle the Lake Superior Chippewa, we witness a national patronage system gone awry. Secretary of the Interior Ewing, Commissioner of Indian Affairs Brown, Territorial Governor Ramsey, and the unusually eager and ambitious Sub-Agent Watrous, each from his own distinctive concerns, each with his own network of patrons and henchmen to serve or to satisfy, were directly responsible for arranging this affair. Each bent a near obsolete public policy to his personal career interests and political obligations.[89] Certainly, the consequences of their decisions were exacerbated by legislative chance and environmental accident. Nonetheless the Chippewa's death march was directly caused, to borrow James MacGregor Burns' illuminating phrase, by the self-interested operations of several of those "little circles of influence" that have plagued American life for two centuries.[90] Sub-Agent Watrous did not have to cause the actual permanent relocation of the Chippewa to achieve his personal or his political goals; he had only to seem to do so. Being able to claim a large increase in the Indians under his jurisdiction, he was successful in obtaining an upgrading of the status of his post to a full agency, a promotion to agent, the doubling of his salary, and whatever gratuities

grateful St. Paul contractors and Sandy Lake traders may have delivered into his hands.

But what did these Chippewa accomplish for themselves by effectively blocking the efforts of American officials to treat them as an exploitable natural resource? The late Homer G. Barnett has noted that "Dispossession of land and its equivalent, migration, requires adaptation if a group is to survive."[91] The Lake Superior Chippewa, by the terms of the treaties of 1837 and 1842, experienced the loss of ownership of the habitats they had conquered a century earlier, although they skillfully avoided total eviction from these lands. Nonetheless, although they escaped forced emigration, they, too, had to adapt, for their social and physical environments did not remain constant. For decades they were able to apply old knowledge and skills to obtain the essentials for their lives, ranging over familiar terrain, still little settled by Americans, exploiting known sources of food and raw material, while also adjusting themselves to the changing circumstances brought by booming timber and mining industries, and by their status as dependent wards of the federal government.

It was twenty years before all the reservations granted in the 1854 treaty were selected and surveyed, at which moment American settlements had advanced to the point where the federal government at last required the Wisconsin Chippewa to settle on and to extract their subsistence from within these confined spaces. It was in the mid-1870s that the first clear evidence of cultural disintegration appeared in the form of a revitalization movement, the Dream Dance, a missionary-spread new religion, which sought through collective application of

supernatural power to defeat American economic and political ascendancy. A full century later, the legal heirs and political successors to the old Chippewa bands turned to the federal courts for a different type of aid, seeking to recover rights allegedly granted to their ancestors by treaty. Employing quite different premises and tactics than in earlier years, the modern Chippewa have met with somewhat greater success. By the later 1980s, they were truly experiencing intensive "settlement pressure," that is, competition for scarce natural resources with their neighbors. The consequences of this latest engagement between Chippewa, American neighbor, and the federal patronage system will be a task for some future scholar to describe, assess, and explain.[92]

Endnotes

[1] This essay reports some findings of the Old Northwest Indian Removal Project, which was supported by a research grant from the National Endowment of the Humanities. The author is indebted to numerous readers of earlier drafts for their aid and useful suggestions, especially Victor Barnouw, Tom Biolsi, John Clark, Faye Clifton, Conrad Heidenreich, Michael Green, Jeanne Kay, Robert Kvasnicka, James McClurken, Joseph Manzo, Bruce Trigger and Richard White; and also Paul Haas, John D. Haeger, and Paul Prucha. In the interests of saving space, citations for this essay have been much abbreviated. A full bibliography is contained in the author's *The Voight Decision and Wisconsin Chippewa Treaty Rights: A Critical Bibliography* (Institute for the Development of Indian Law, forthcoming); and in the archives of the Old Northwest Indian Removal Project.

[2] The nomenclature, "Lake Superior Chippewa," came into use only during negotiations for the Treaty of

1854 at the insistence of the Wisconsin and Upper Peninsula of Michigan bands, who wished to sever all relationships with the bands on the Upper Mississippi River. See, R. Ritzenthaler, "Southwestern Chippewa," in B. G. Trigger, ed., *Handbook of North American Indians*, Vol. 15, *Northeast* (Smithsonian Institution, 1978), 743-59.

[3] The incident is mentioned in a few older state and regional histories such as J. N. Davidson's, *In Unnamed Wisconsin* (Milwaukee 1895), 168; and is briefly discussed in V. Barnouw's *Acculturation and Personality Among the Wisconsin Chippewa* (American Anthropological Association Memoir No. 72, 1950), 37, 59. Such descriptions are based on other secondary and scanty primary sources, principally the Rev. J. H. Pitezel's eyewitness account in *Lights and Shades of Missionary Life* (Cincinnati, 1860), 298. E. J. Danziger, in his *The Chippewas of Lake Superior* (University of Oklahoma Press, 1978), 88, and his "They Would Not be Moved: The Chippewa Treaty of 1854," *Minnesota History*, 43 (1973), 178, touches the episode in passing. William C. Haygood's editorial comments, accompanying publication of excerpts from Benjamin J. Armstrong's reminiscences in his old age, attempted a sketchy assessment of the incident, but these remarks are not well informed. See, "Reminiscences of Life Among the Chippewa." *Wisconsin Magazine of History*, 4 Parts, 55: 175-96, 287-309; & 56: 37-58, 140-61. In the extensive interviewing preceding his *Wisconsin Chippewa Myths and Tales and Their Relation to Chippewa Life* (University of Wisconsin Press, 1977), Barnouw found no oral traditions concerning the events (Barnouw to Clifton, Personal Communication, 1985). Nor are there any such folk memories recorded in the major 20th-Century collections of Chippewa oral traditions, such as the Charles Brown Papers, Col. HB, State Historical Society of Wisconsin, or the U. S. Works Progress Administration's Chippewa Historical Project Records, Microfilm 532, State Historical

Society of Wisconsin. The last recorded Chippewa mention of this episode dates to 1864, when the Lake Superior chiefs assembled to record their memories of treaty dealing with the United States. See, G. P. Warren, "Statement of Treaties between the Chippewa Indians and the United States, from 1825-1864, from the Chippewa Standpoint," File 1864, Guide 714 (State Historical Society of Wisconsin).

[4] The cases include, in Wisconsin – the Winnebago, Menomini, Potawatomi communities north of Milwaukee, Chippewa of Lake Superior, Mdewakonton Dakota, and the Emigrant New York Indians (Oneida, Stockbridge-Munsee, and the Brotherton); in Ohio – five groups; in Indiana – two groups; in Illinois – three groups; in Michigan – six groups; and from Ontario – two small groups, the Moravian Delaware and Anderdon Hurons.

[5] For the Indiana Potawatomi episode, see J. A. Clifton, *The Prairie People: Continuity and Change in Potawatomi Indian Culture* (Lawrence: Regents Press of Kansas, 1977), 270-72, 296-99; and, R. A. Trennert, Jr., "A Trader's Role in the Potawatomi Removal from Indiana: The Case of George W. Ewing," *The Old Northwest*, 4 (1978), 3-24. The best overview of the Winnebago case is N. O. Lurie, "Winnebago," in, Trigger, *Handbook-. . . Northeast*, 690-707. For the Sauk and Fox case see A. F. C. Wallace "Prelude to Disaster," which is lodged amidst Ellen M. Whitney's near comprehensive collection of documents bearing on that episode, *Collections of the Illinois State Historical Library*, 35 (1970).

[6] Recent historical studies of Indian removal exhibit a striking bias as regards commercial "motives" in Indian removal. In his overview of Old Northwest removal, for instance, F. P. Prucha devotes a full section to this topic without once mentioning the involvement and interests of Protestant and Catholic missionaries in implementation of the policy in the region. See his, *The Great Father:*

The United States Government and the American Indians (University of Nebraska Press, 1984), Vol. 1, 266-69. Compare, G. A. Schultz, *An Indian Canaan: Isaac McCoy and the Vision of an Indian State* (University of Oklahoma Press, 1972), 123 – 40.

[7] Taliaferro Journals (Minnesota Historical Society), Vol. 10, May 22, 1836; R. W. Meyer, *History of the Santee Sioux* (University of Nebraska Press, 1967), 56-59; H. Hickerson, *Sioux Indians I: Mdewakanton Band of Sioux Indians* (New York: Garland, 1974), 159-205.

[8] *Kinsmen of Another Kind: Dakota-White Relations in the Upper Mississippi Valley, 1650-1862* (University of Nebraska Press, 1984), esp. x-xiii and 150-57.

[9] For background to the Moravian migration, see F. C. Hamil, *The Valley of the Lower Thames, 1640-1850* (University of Toronto Press, 1951), 108-111; C. A. Weslager, *The Delaware Indians: A History* (Rutgers University Press, 1972); and, I. Goddard, "Delaware," in Trigger, *Handbook . . . Northeast*, 213-239. For the background on the Anderdon Hurons, see, C. E. Heidenreich, "Huron," and E. Tooker, "Wyandot," in Trigger, *Handbook . . . Northeast*, 369-88 and 398 – 406; J. A. Clifton, "Hurons of the West: Migrations and Adaptations of the Ontario Iroquoians, 1650-1704," Research Report, Canadian Ethnology Service, National Museum of Man (Ottawa, 1977); and his, "The Re-emergent Wyandot: A Study in Ethnogenesis on the Detroit River Borderland, 1747," in, K. G. Pryke and L. L. Kulisek, eds., *The Western District* (University of Windsor, 1983); C. G. Klopfenstein, "The Removal of the Wyandots from Ohio," *Ohio Historical Quarterly*, 66 (1957), 119-136; Robert E. Smith, Jr., "The Clash of Leadership at the Grand Reserve: The Wyandot Sub-Agency and the Methodist Mission, 1820-1824," *Ohio History*, 89 (1980), 181-205; and, E. J. Lajeunesse, C.S.B., *The Windsor Border Region* (Toronto: The Champlain Society, 1960).

[10] M. J. Mochon, "Stockbridge-Munsee Cultural Adaptations: 'Assimilated Indians.'" *Proceedings of the American Philosophical Society* 112 (1968), 182-219.

[11] Rev. J. Vogler to H. R. Schoolcraft, April 10; Schoolcraft to Commissioner of Indian Affairs [COIA] C. A. Harris, April 17 & 28; COIA to Schoolcraft, April 29; Schoolcraft to Vogler, May 8, 1837, in, *Records of the Michigan Superintendency, National Archives Microfilm Series M1* [NAM M1], Rolls 37 & 42. Schoolcraft to COIA August 14, and to Gov. H. Dodge, 14 August, 1837, *NAM M1, Roll 37. Supt. W. Clark to COIA, November 17, 1837, Office of Indian Affairs, Letters Received, NAM M234*, Roll 756; Harris to Captain E. A. Hitchcock, December 2, 1837, *Office of Indian Affairs, Letters Sent, NAM M21, Roll 23. R. Cummins to Pilcher, February 4, 1840, NAM M234*, Roll 301. J. Johnston to COIA T. H. Crawford, March 14, 1842, *NAM M234*, Roll 602; Wyandots of Canada to Sir Charles Bagot, October 10, 1842, *Record Group 10:, Indian Affairs, Red Series – Eastern Canada* (Ottawa, Public Archives of Canada) [*PAC RG10*], Vol. 125. For the joint emigration, See Klopfenstein, "Removal of the Wyandots." Petition of the Hurons to Col. William Jarvis, May 3, 1842, *PAC RG10*, Vol. 125. Wyandot Muster Roll – 1843, Entry 301, *Record Group 75, Records of the Bureau of Indian Affairs, National Archives and Records Service* [RG75].

[12] J. A. Clifton, *A Place of Refuge For All Time: Migration of the American Potawatomi Into Upper Canada* (Ottawa: National Museum of Man, 1975); R. F. Bauman, "The Migration of the Ottawa Indians from the Maumee Valley to Walpole Island," *Northwest Ohio Quarterly*, 21 (1949), 86-112.

[13] Gov. Ramsey's report, November 3, 1851, in *Annual Report of the Commissioner of Indian Affairs* (Washington, D.C., 1851) [ARCOIA], 421-22. For sketches of the use of force and of those communities which avoided removal, see the relevant chapters in Trigger, *Handbook*

. . . *Northeast:* see also, Mochon, "Stockbridge-Munsee"; Clifton, *Prairie People* and *The Pokagons, 1683-1983: Catholic Potawatomi of the St. Joseph River Valley* (University Press of America, 1984), Wallace, *Prelude to Disaster;* and, P. K. Ourada, *The Menominee Indians: A History* (University of Oklahoma Press, 1979), 106-123.

[14] H. R. Schoolcraft, *Personal Memoirs of a Residence of Thirty Years with the Indian Tribes on the American Frontiers* (Philadelphia, 1851), 628-29; A. Jackson's Message of March 4, 1837, in, J. D. Richardson, comp., *A Compilation of the Messages and Papers of the Presidents, 1789-1897* (Washington, D.C., 1896-1899), Vol. 2, 541; M. Van Buren's Message of December 5, 1837, in, F. L. Israel, ed., *The State of the Union Messages of the Presidents* (New York, 1966), Vol. 1, 490; *ARCOIA* (1838), 410-411.

[15] Prucha's *The Great Father,* 241-42, provides a useful recent overview of selected features of Old Northwest Removal. The author views the whole process through the eyes of American elites and authorities in Washington, often reflecting but not penetrating their idealized aims and ideological pronouncements, while displaying little understanding of the native peoples and their responses to the policy.

[16] W. Miles, " 'Enamoured with Colonization': Isaac McCoy's Plan of Indian Reform," *The Kansas Historical Quarterly,* 38 (1972), 268-286, has done so.

[17] Treaty with the Sioux, etc., August 19, 1825, 7 U.S. Statutes 272; Treaty with the Chippewa, August 5, 1826, 7 U.S. Statutes 290; and, Treaty with the Chippewa, etc., August 11, 1827, 7 U.S. Statutes 303. Also, Charles J. Kappler, comp. *Indian Treaties: 1778-1883* (reprinted, New York, 1972), 250-55, 268-71; 281-83.

[18] Kappler, *Indian Treaties,* 269.

[19] Flat Mouth's speech, in, Taliaferro to Governor Henry Dodge, September 29, 1836. *NAM M234,* Roll 757.

He was referring to the 1836 treaty with the Ottawa and Chippewa of Michigan. For accounts of Lake Superior Chippewa impoverishment in this period, see, G. Franchere to W. Brewster, 14 March 1835, Records of the American Fur Company, Steere Collection, Baylis Public Library, Sault Ste Marie, Michigan, Box 1, Folder 3; Bisheke [Chief Buffalo] to H. R. Schoolcraft, September 8, 1835, *NAM M1,* Roll 72; and, E. A. Brush to Lewis Cass, *NAM M234,* Roll 664.

[20] Secretary of War Lewis Cass to President Van Buren, March 7, 1836, *NAM M21, Roll 18.*

[21] The correspondence, reports, petitions, and memorials concerning their efforts are extensive. For samples, see, S. C. Stambaugh to H. R. Schoolcraft, June 8, 1836, *NAM M1,* Roll 72; COIA C. A. Harris to Governor Dodge, October 15, 1836, *NAM M21,* Roll 20; and, Bailey to COIA E. Herring, June 18, 1836, *NAM M234,* Roll 422.

[22] COIA Harris to A. Bailey, July 15, 1836, *NAM M21,* Roll 19; Hitchcock to Harris March 30, 1837, *NAM M234,* Roll 751; Taliaferro to Dodge, 30 January, 24 July, and August 2, 1837, *NAM M234,* Roll 758; and, Dodge to Harris, August 15, 1837, *NAM M234,* Roll 758. Major Hitchcock, a regular Army officer, was disbursing agent at the St. Louis Indian Superintendency. The antagonism of some Chippewa to certain traders was real. In December, 1836 a party of Chippewa murdered William Aitken, Jr., the son of a prominent trader by an Indian woman, one of the rare acts of violence by these Chippewa against Americans.

[23] Identified as Royce Area 242, Fig. 1.

[24] COIA Harris to Dodge and General William Smith, May 13, 1837, *NAM M21,* Roll 21. General Smith did not arrive to participate in the treaty negotiations. Earlier, when Secretary of War Cass issued orders for removal treaties with the Winnebago, Menomini, and Emigrant

New York Indians, he explicitly excluded the interior Wisconsin Chippewa. See, Cass to Dodge, July 7, 1836, *'NAM M21*, Roll 19.

[25] The first sub-agent at La Pointe, Daniel P. Bushnell, was appointed by Governor Dodge in November, 1836, but was not confirmed until the following April. Edward E. Hill, *The Office of Indian Affairs, 1824-1880: Historical Sketches* (New York, 1974), 88.

[26] Edward D. Neill, "Occurences in and Around Fort Snelling, from 1819 to 1840," *Minnesota Historical Society Collections*, Vol. 2, 131; William T. Boutwell, "Journel," July 5, 1837, in, *Boutwell Papers*. Col. A.B. 781, Minnesota Historical Society; and, "D. P. Bushell's Report," in, *ARCOIA*, (1838), 467-68.

[27] 1837 Treaty Journal, encl. in Van Antwerp to COIA, September 30, 1837, *Documents Relating to the Negotiation of Ratified and Unratified Treaties, with Various Indian Tribes, 1801-1869, NAM T494*, Roll 3; Warren, "Statement of Treaties." Also see, Hill, *The Office of Indian Affairs*, 90-91, 160-61.

[28] Both came from villages outside the area being ceded. *Magegabow* was a war chief from Leech Lake, *Bugonageshig* an extraordinarily ambitious upstart village leader from Gull Lake. See, James G. E. Smith, *Leadership Among the Southwestern Ojibwa*, Publications in Ethnology No. 7, National Museum of Man (Ottawa, 1973).

[29] See Dodge's marginal notes on p. 21 of the treaty journal to this effect.

[30] This they subsequently did. See, Warren, "Statement of Treaties"; and, Obishkawzaugee's Speech, September 12, 1869, *NAM M234*, Roll 394.

[31] Boutwell to Rev. David Green, August 17, 1837, *American Board of Commissioners for Foreign Missions Papers* (Minnesota Historical Society – Transcripts of

Originals in Houghton Library, Harvard University) [ABCFMPMNHS], Box 2.

[32] Rev. Frederick Ayer to President Martin Van Buren, September 30, 1837; Gov. Dodge to COIA, February 17, 1838, *NAM M234*, Roll 387.

[33] J. Schoolcraft to H. R. Schoolcraft, November 21 and December 1, 1837, *NAM M1*, Roll 45.

[34] B. F. Baker to COIA, January 9, 1838, *NAM M234*, Roll 758; Dodge to COIA, July 6, 1838, in, C. F. Carter and J. P. Bloom, eds., *Territorial Papers of the United States* (Washington, D.C., 1934-1969) [TPUS], Vol. 17, 1029-31; and, COIA to Dodge, July 26, 1838, *NAM M21*, Roll 24; A. Brunson to R. Stuart, July 20, 1843, *NAM M1*, Roll 55.

[35] A. W. Schorger, "The White-Tailed Deer in Early Wisconsin," *Transactions of the Wisconsin Academy of Sciences, Arts, and Letters*, 42 (1953), 197-247; and, H. Hickerson, *The Southwestern Chippewa: An Ethnohistorical Study*, American Anthropological Association Memoir No. 92 (1962), 12-27. Gary C. Anderson in, *Little Crow: Spokesman for the Sioux* (Minnesota Historical Society Press. 1986), p. 57, points out that by 1851 Medwakanton Dakota were again hunting deer in the St. Croix valley, then "more abundant than in previous seasons," near areas cut-over by timber men.

[36] D. P. Bushnell to Dodge, February 12, 1839, *TPUS* 27:1196; and, H. Dodge to Secretary of War, April 25, 1841, *NAM M234*, Roll 759.

[37] Treaty with the Chippewa, October 4, 1842, 7 U. S. Statutes 591; Kappler, *Indian Treaties*, 542-45. The lands involved are identified as Royce Area 261, Fig. 1.

[38] For a discussion of "half-breeds," "mixed-bloods," and other cultural marginals, see, James A. Clifton, *Being and Becoming Indian: Biographic Studies of North American Frontiers* (Chicago. The Dorsey Press, in press).

[39] Kappler, *Indian Treaties*, 542-45. Official Documentation for this treaty is scanty, since Stuart kept no journal and delivered no written report on his deliberations. However, the Rev. L. H. Wheeler independently prepared a journal, including a particularly full eye-witness description of events, which he sent to his superior, David Creene, May 3, 1843, ABCFMP-MNHS, Box 3. Moreover, because of the controversy aroused, there is an unusual amount of supplementary reporting on these negotiations, for example in Warren, "Statement of Treaties," and from other Chippewa and American participants, such as A. Brunson to J. D. Doty, January 6, 1843, NAM M1, Roll 54.

[40] P. Holland, *The Philosophie, Commonlie Called, The Morals of Plutarchus* (London, 1603), 1237.

[41] COIA Crawford to Stuart, August 1, 1842, *NAM M1*, Roll 53.

[42] A. Brunson, *A Western Pioneer* (Cincinnati, 1872), Vol. 2, 165-69; Stuart to COIA, October 24 and November 19, 1842, *NAM M1*, Roll 39; *ARCOIA* 1842, 401-401; A. Brunson to Gov. J. D. Doty, January 8, 1843 (encl., letter from Chief Buffalo to L. Warren, October 29, 1842 & speech of White Crow, December 18, 1842), *NAM M234*, Roll 388; and the Rev Wheeler's account of the negotiations, cited above.

[43] Stuart, "Substance of Talk to the Chippewa," September 29, 1842 (a communication reconstructed later and enclosed in Stuart to COIA, March 29, 1844), *NAM M234*, Roll 389. Cyrus Mendenhall to COIA, January 6, 1851; Rev. L. H. Wheeler, "Journal of 1842 Treaty," in, Wheeler to Rev. David Greene, May 3, 1843, ABCFMP-MNHS, Box 3; Stuart to Rev. Greene, December 8, 1842; Chief Martin to Rev. A. Brunson, encl. in Brunson to COIA, to Gov. Doty, and to Secy. War Spencer, January 8, 1843, *NAM M234*, Roll 388; Warren, "Statement of Treaties" (section on 1842 treaty).

[44] In the memoir dictated in his old age, B. G. Armstrong claimed Stuart had promised that the Chippewa could remain on their lands so long as they remained peaceful. There is no independent suggestion of the truth of this assertion – that continued occupancy and use rights were contingent on good behavior as there is little support for other such claims in Armstrong's reminiscences. Americans in the era would have classified any such misbehavior as "depredations," individual acts, which under the Trade and Intercourse Act of 1834 and Chippewa treaties required the punishment of the individuals concerned, not the tribe collectively. Armstrong, a self proclaimed "friend of the Chippewa," was actually an inconsequential figure on this frontier, who in his later years much inflated his role as mover and shaker among the Chippewa and in the corridors of power. He is barely mentioned in contemporary public and private sources, where some of his depictions are contradicted and other unsupported by various eye-witness participants. The original is, *Early Life Among the Indians* (Ashland, Wisconsin, 1892); edited excerpts republished as Armstrong, *Reminiscences*.

[45] *Kappler, Indian Treaties*, 542-45; Brunson to Doty, July 19, 1842, *NAM M234*, Roll 388; Stuart to D. Greene, December 8, 1842, *ABCFMP-MNHS*, Box. 3. For background on mining developments in the area, see R. J. Hybels, "The Lake Superior Copper Fever," *Michigan History*, 23 (1950), 97-119 & 309-26.

[46] Doty to Secretary of War, November 17, 1841; H. L. Dousman and H. H. Sibley to Secretary of War, February 18, 1841; and L. Warren to Doty, October 2, 1841; in, *NAM M234*, Roll 388.

[47] Identified as Royce Area 332, Fig. 1.

[48] Doty to COIA, April 5, 1843, *NAM M234*, Roll 517; and, Stuart to COIA, June 2, 1843, *NAM M1*, Roll 39.

[49] Doty to COIA, April 5, 1843, *NAM M234* Roll 427. COIA to Stuart, 13 May, 1843, *NAM M1* Roll 54. Stuart to COIA, 2 June, 1843 & 29 March, 1844, *NAM M1* Roll 39. COIA W. Medill to I. A. Verplanch & Charles Mix, June 4, 1847, *NAM M21* Roll 39. COIA to Gov. Dodge, August 2 and 16, 1847, *NAM M21* Roll 40. C. Borup to W. A. Richmond, August 31, 1847, *NAM M1* Roll 61, COIA to G. Copway, December 14, 1847, *NAM M21* Roll 40; and, *ARCOIA* 1847, 8-9.

[50] COIA Medill to Dodge, October 31, 1846; and to Henry M. Rice, October 31, 1846, *NAM M21* Roll 38, Medill to Dodge, August 2, 1847; and to Brig. Gen. R. Jones, December 6, 1847, *NAM M21* Roll 40.

[51] There is no hint of such a commitment in the records of this treaty negotiation or in the Chippewa complaints about these immediately thereafter. The 1848 assertion was probably an example of Chippewa negotiating style, although they certainly wanted reservations.

[52] They were imitating the Indians of Michigan's lower peninsula who had used this same tactic successfully more than a decade earlier. See, J. McClurken, "Strangers in Their Own Land," *The Grand River Valley Review* (1985), Vol. 6, 2-26; and J. A. Clifton, "Leopold Pokagon: Transformative Leadership on the St. Joseph River Frontier," *Michigan History* (1985), Vol. 69, 16-23.

[53] Medill to R. McClelland, March 3, 1848, *NAM M21* Roll 40; G. Johnston to H. R. Schoolcraft, June 28 & August 18, 1848, *NAM M234* Roll 771; Medill to J. E. Fletcher, c/o T. Harvey, August 17, 1848, *NAM M21* Roll 41; Petition of Lake Superior Chippewa Head Chiefs, February 5, 1849, House Misc. Doc. 36, 30-2 [CS 544]; Delegation of Chippewa Head Chiefs to President, February 5, 1849, *NAM M234* Roll 390; Medill to Livermore, August 22, 1848 & February 12, 1849, *NAM M21* Roll 41. S. Hall to A. Hall, March 28, 1849, *Northwest Mission*

Papers [NWMP-UMD] Box 1, Folder 1, University of Minnesota – Duluth; Pitezel Journal, July 9, 1849, *J. H. Pitezel Papers [JPP-CHL]*, Clarke Historical Library, Central Michigan University. "Chippewas of L'ance," *Lake Superior News & Mining Journal [LSN&MJ]*, June 12, 1850.

[54] "Removal of the Payments to Sandy Lake," Journal V, 1851, *JPP-CHL*.

[55] R. A. Trennert, "Orlando Brown," in, R. M. Kvasnicka and H. J. Viola, eds., *The Commissioners of Indian Affairs, 1824-1977* (University of Nebraska Press, 1979), 41-48.

[56] Relocating the Chippewa would have meant the loss of the only females then available to loggers and miners. Indeed, the infrequent conflicts that erupted between Americans and Chippewa were occasioned by the former trying to gain sexual access to Chippewa women. See, R. N. Current, *The History of Wisconsin: Civil War Era, 1848-1873*, (State Historical Society of Wisconsin, 1976), Vol. 2, 154.

[57] H. M. White, *Guide to the Microfilm Edition of the Alexander Ramsey Papers and Records* (Minnesota Historical Society), 16-18; and, Current, *History of Wisconsin*, Vol. 2, 197-205. The Lake Superior Chippewa's annual monetary value that year consisted of $22,000, and $44,200 in goods and services, plus the salaries of employees of the Indian Department. All cash payable in specie – gold and silver. This was a considerable resource for a struggling, cash-poor new Territory. See "Omnibus Appropriation Bill," House Miscellaneous Document 57, November 12, 1850, 31-1, Vol. 2, p. 61 [CS 582].

[58] Presidential Order, February 6, 1850, in C. J. Kappler, *Indian Affairs: Laws and Treaties*, 5 Vols. (Washington, D.C., 1904-1941), Vol. 5: 663; Brown to Ramsey, February 6, 1850, *NAM M21* Roll 43; Ramsey to Livermore, March 4; and, Livermore to Ramsey, March 21, 1850 *NAM M234*

Roll 428; Secretary of State, *Legislative Manual of the State of Wisconsin*, 9th Ed. (Madison, 1870), p. 209.

[59] Brown to Watrous, April 22, 1850, *NAM M21* Roll 43; "John S. Watrous File," in, Minnesota Territory, Appointments Division, Secretary's Files, *National Archives Record Group 48, Interior Department Appointment Papers* [*RG48*].

[60] Rev. Wheeler to Ely, June 19 & July 22, 1850; Rev. Hall to Ely, July 16, 1850; in, *E. F. Ely Papers* [*EFEJ-SHSW*], State Historical Society of Wisconsin, Vol. 3.

[61] S. B. Treat to COIA Lea, May 12, 1852, *ABCFMP-MNHS*, Box 6.

[62] J. N. Davidson, "Missions on Chequamegon Bay," *Collections of the Wisconsin State Historical Society*, Vol. 12, 434-52; *Milwaukee Weekly Wisconsin*, June 5, 1850; J. P. Durban to Secretary of the Interior, October 3, 1850, *NAM M234*, Roll 767; D. King, *et al.*, to D. Atkins, July 15, 1850, *NAM M234*, Roll 771; S. Hall to Treat, 28 March 1850, *ABCFMP-MNHS*, Box 5; Hall to Ramsey, 28 March 1850, *NAM M234*, Roll 168; H. Hall to L. D. Mudgett, March 13, 1850, *NWMP-UMD*, Box 1. Hall to Treat, October 7, 1852 and May 17, 1853, *ABCFMP-MNHS*, Box 6.

[63] Mendenhall to Lea, January 6, 1851, *NAM M234* Roll 767; Congressman J. R. Giddings to President, July 30, 1850, w/ encl., Petition from Citizens of Lake Superior South Shore, *NAM M234* Roll 390; *LSN&MJ*, June 5 and 12, 1850; *Milwaukee Weekly Wisconsin*, June 5 and July 3, 1850; J. P. Durban to Secretary of the Interior, October 3, 1850, *NAM M234* Roll 767. D. Aitken to Lea, August 26, 1850, *NAM M234* Roll 771. "Important Movement Among the Chippewa," and, "Chippewa Delegation," *Detroit Free Press*, November 28, 1848 and February 19, 1849.

[64] *LSN&MJ*, June 5, 1850; Pitezel Journal, Vol. 5, June 3, 1850, *JHPP-CHL;* L. H. Wheeler to E. F. Ely, July 22,

1850, E. F. Ely Papers [*EFEP-MNHS*], Minnesota Historical Society, Vol. 3; "Correspondence from J. Bowron," *Boston Daily Journal*, September 14, 1850; Watrous to COIA, December 31, 1850, *NAM M234*, Roll 767; Watrous to Ramsey, November 14, 1850. *NAM M234*, Roll 767.

[65] Brown to Ramsey, March 26, 1850; Watrous was handed his commission in Washington a month later – Brown to Watrous, April 22; *NAM M21*, Roll 43; "Indians to be Removed," June 1, and "From the Lake Superior Journal," June 27, 1850, *Detroit Free Press*.

[66] Pitezel, "President Conditions and Prospects of the Missions," Journal, Vol. 5, July, 1850, *JHPP-CHL;* Hall to Ely, February 24, 1851, *EFEP-MNHS*, Vol. 3; Pitezel, *Lights and Shades*, 247; Hall to Ely, February 24, 1850, Vol. 3, *EFEP-SHSW; Annual Report of the Missionary Society of the Methodist Episcopal Church* [*ARMS-MES*], 1850, 70-71.

[67] Pitezel, "Journal," Vol. 5 (1851), *JHPP-CHL;* Armstrong "Reminiscences," 290-92; W. Bartlett, *History, Tradition, and Adventure in the Chippewa Valley* (Chippewa Falls, Wisconsin, 1929), 67-70, 119-120; Watrous to Ramsey, n.d. [c. December 12], 1850. *NAM M234*, Roll 767

[68] Bartlett, *History, Traditions*, 69; J. E. Fletcher to Superintendent T. H. Harvey, November 14, 1850, *NAM M234*, Roll 760; Pitezel, *Lights and Shades, 298-99; Watrous to Ramsey, November 14; n.d.* [c. December 12]; & December 30, 1850; in *NAM M234* Roll 767. Chippewa Annuity Pay Rolls, 1850, Item 186, Annuity Pay Lists. *RG 75.*

[69] Pitezel, Journal, Vol. 5 *JHPP-CHL* (1851); E. D. Neill, "History of the Ojibways," *Collections of the Minnesota Historical Society*, 5 (1885), 500; Armstrong, "Reminiscences," 289-92; Hall to Ely, December 25, 1850, *EEJ-SHSW*, Vol. 3.

[70] Watrous to Ramsey, November 13 & 14; n.d. [c. December 12]; & December 30, 1850; in *NAM M234* Roll

767; Ramsey to COIA; December, 1850; in *NAM M234* Roll 767; *HMD 57*, 61.

[71] Ramsey to COIA, November 14, encl., Watrous to Ramsey, November 12, 1850, *NAM M234*, Roll 767; Annuity Records, 20607-#798. Sandy Lake Sub-Agency, December 2, 1850, *RG 75*.

[72] Chippewa Chiefs [of interior] to President Fillmore, [c. November], 1852; and, Chief Buffalo, *et al.*, [of lake shore] to COIA Lea, November 6, 1851; in, *NAM M234*, Roll 149; Watrous to Ramsey, December 10, 1850; W. W. Warren to Ramsey, January 21, 1851; Ramsey to COIA Lea, March 27, 1851; all in *NAM M234*, Roll 747. Hall to Treat, December 30, 1850, *ABCFMP-MNHS*, Box 5. H. Hall to L. Burbank, January 14, 1861, *NWMP-UMD*, Box 1, Folder 41; and, Pitezel, Journal Vol. 5, July, 1851, *JPP-CHL*.

[73] Chippewa Chiefs to President Fillmore, and Chief Buffalo, *et al.*, to COIA Lea, cited above. Watrous to Ramsey, December 10, 1850; W. W. Warren to Ramsey, January 21, 1851; Ramsey to Lea, March 27, 1851; all in *NAM M234*, Roll 747. "Lake Superior and Mississippi bands Chippewa Chiefs, Sandy Lake Sub-agency, December 2, 1850, Receipt for Provisions," Annuity Records, Item 20607 – #798, *RG 75*. Hall to Treat, December 30, 1850, *ABCFMP-MNHS*, Box 5; Hall to L. Burbank, January 14, 1851, *NWMP-UMD*, Box 1, Folder 41. Pitezel, "Journal," Vol. 5, July, 1851, *JPP-CHL*.

[74] Lea to Secretary of the Interior, June 3, 1851, Report Books of the Office of Indian Affairs, *NAM M348*, Roll 8. C. K. Smith (Secretary, Minnesota Territory) to Lea, February 7, 1851; and, Petition of Wisconsin Assembly, February 18, 1851; both in *NAM M234*, Roll 767. *LSN&MJ*, June 11 & 18, July 28, & September 27, 1851. P. Greely (Collector of the Customs, Boston), w/encl., Boston news clipping, to Secretary of the Treasury, August 23, 1851,

NAM M234, Roll 149, Watrous to COIA, July, 1851, *NAM M234*, Roll 149.

[75] Watrous to Ramsey, September 22, 1851, *NAM M234*, Roll 149. See also, COIA to Secretary of the Interior, June 3, 1851, *NAM M348*, Roll 8; Lea to Watrous, 25 August, 1851, *NAM M21* Roll 45; and, Treat to Hall, September 24, 1851, *ABCFMP-MNHS* Box 5.

[76] Watrous survived the charges against him of dereliction in public duty. His patrons in Washington and Minnesota defended him until mid-1852, when he fell under a graver suspicion, of infidelity in political character. It was first claimed, then confirmed, that Watrous had been masquerading under false party colors. As a Minnesota competitor put it on February 28, 1853, he came "on to the Mississippi a rampant Whig. He now pretends to be a strong Democrat." It was an appropriate time for Watrous to adopt this fresh party hue, for Franklin Pierce was to be inaugurated three days later. While this switch did not save him his position as Indian Agent under the new Democratic administration, it did ease the way for his later success in Minnesota. He settled in the Fond du Lac area where he became the Register of the U. S. Land Office, and, after Minnesota's statehood, the first – Democratic – Speaker of the Minnesota Assembly. As he had anticipated in 1850, a tour as Indian Agent was a profitable thing for a young man on this frontier, both financially and as a means of career advancement. See, E. Whittsley to President Fillmore, April 17, 1852, *NAM M234*, Roll 149; and November 16, 1852, Roll 767. J. R. Carey, "History of Duluth, and of St. Louis County to the Year 1870," *Minnesota Historical Collections* Vol. 9, 250. S. B. Olmstead to S. B. Lowry, February 28, 1853, in, "John Watrous File," *RG 48*.

[77] Watrous to Lea, June 7, 1852, *NAM M234*, Roll 149; Citizens of Lake Superior Petition to President Filmore, June 4, 1852, *NAM M234*, Roll 149; Chief Buffalo to

Ramsey, July 23, 1852, *NAM M234*, Roll 428; B. Armstrong, *Early Life Among the Indians*, 26, 30-31, 101. There is no separate confirmation of Armstrong's claims to personal credit for this success. "Treaty with the Chippewa, 1854," Kappler, *Indian Treaties*, 648-52.

[78] *The Last Trek of the Indians* (University of Chicago Press, 1946), 14-15.

[79] Charles Callender calls this the secondary or lesser configuration of Old Northwest Indian patterns in his, "Great Lakes-Riverine Sociopolitical Organization," in Trigger, *Handbook . . . Northeast*, 610.

[80] James A. Clifton, *A Place of Refuge;* J. McClurken, "Ottawa Adaptive Strategies to Indian Removal," *The Michigan Historical Review* (1986), Vol. 12, 29-57.

[81] Callender refers to this as the dominant configuration in the Old Northwest, "Great Lakes-Riverine," 610.

[82] See, Treaties with the Seneca, Shawnee, and Ottawa, 1831 in Kappler, *Indian Treaties*, 325-39. Also, Prucha, *Great Father*, Vol. 1, 247-48.

[83] James A. Clifton, "From Bark Canoes to Pony Herds: the Great Lakes Transportation Revolution, 1750-1775," *Henry Ford Museum & Greenfield Village Herald* (Vol. 15, 1986), 12-19.

[84] C. G. Klopfenstein, "The Removal of the Indians from Ohio, 1820-1843," Ph. D. diss., Western Reserve University, 1956, 61-62; J. Johnston to L. Cass, February 3, 1824 and April 14, 1825, *NAM M1*, Rolls 14 and 16; "Wapokonetta Council," *Niles Weekly Register*, June 25, 1825; E. W. Duval to Secretary of War Calhoun, November 28, 1824, *NAM M234*, Roll 60; Actg. Governor R. Crittenden to Calhoun, September 28, 1823, *TPUS*, Vol. 19, 549.

[85] Bert Anson, *The Miami Indians* (University of Oklahoma Press, 1970), 213-33, 266-89; S. J. Raefert, "The

Hidden Community: The Miami Indians of Indiana, 1846-1940," Ph. D. diss., University of Delaware; Clifton, *The Pokagons*.

[86] R. F. Bauman, "Kansas, Canada, or Starvation," *Michigan History*, Vol. 36, 287-98; Clifton, A Place of Refuge.

[87] See, *Great Father*, Vol. 1, 244; compare, James A. Clifton, "Escape, Evasion, and Eviction: Adaptive Responses of the Indians of the Old Northwest Territory to the Jacksonian Removal Policy of the 1830s," TS, paper read at the Conference on the American Indian and the Jacksonian Era, Middle Tennessee State University (1980), 17-18 (Copy on deposit, D'Arcy McNickle Center, Newberry Library, and Wisconsin State Historical Society).

[88] See, H. H. Tanner, ed., *Atlas of Great Lakes Indian History* (University of Oklahoma Press, 1986), 122-125.

[89] E. Whittsley to President Fillmore, April 17, 1852, *NAM M234*, Roll 149; and November 16, 1852, Roll 767. Carey, "History of Duluth," 250.

[90] *The Power to Lead: The Crisis of the American Presidency* (New York, 1984), 122.

[91] *Qualitative Science* (New York, 1983), 203-204.

[92] For the later reservation history, see P. Shifferd, "A Study in Economic Change Among the Chippewa of Northern Wisconsin: 1854-1900," *The Western Canadian Journal of Anthropology* 6-4 (1976); and, Danziger, *The Chippewas*, 91-132.

Stipulation And Exhibit D Thereto (Protocols 1-5 And Attachment A To Protocol 5) (Other Exhibits Omitted)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

MILLE LACS BAND OF CHIPPEWA INDIANS, *et al.*, Plaintiffs,	)	
UNITED STATES OF AMERICA, Plaintiff-Intervenor,	)	Civil No. 3-94-1226
and	)	**STIPULATION**
ST. CROIX CHIPPEWA INDIANS OF WISCONSIN, *et al.*, Plaintiff-Intervenors,	)	
vs.	)	
STATE OF MINNESOTA, *et al.*, Defendants,	)	
COUNTY OF AITKIN, *et al.*, Defendant-Intervenors,	)	
JOHN W. THOMPSON, *et al.*, Defendant-Intervenors, and	)	
SAVE LAKE MILLE LACS ASSOCIATION, *Amicus Curiae.*	)	

I. PROCEDURAL BACKGROUND.

In this litigation, plaintiffs (the Mille Lacs Band, et al.) and plaintiff-intervenors (the United States and the six Wisconsin Bands) seek a declaratory judgment: (1) stating that the plaintiff and plaintiff-intervenor Bands continue to possess rights to hunt, fish and gather under the 1837 Treaty with the Chippewa, 7 Stat. 536 ("1837 Treaty"), in the Minnesota portion of the territory ceded in that treaty ("Minnesota Ceded Territory"); (2) defining the nature and scope of those rights; and (3) delineating the restraints that the 1837 Treaty imposes on State regulation of the exercise of those rights. In addition, plaintiff and plaintiff-intervenors seek an injunction barring defendants (the State of Minnesota, et al.), their officers, agents, servants, employees and attorneys, and anyone acting in concert with them, from any actions or inactions which would prevent or interfere with the exercise of such rights except as authorized in the Court's declaratory judgment.

The litigation was bifurcated by court order on April 9, 1991. Phase I was limited to "the threshold issues presented in this case, namely, whether plaintiffs' rights to hunt, fish and gather under the Treaty of 1837 continue to exist, whether they extend to lands now or previously in private ownership, and the general nature of such rights." The matters reserved for Phase II were "resource allocation issues and the validity of particular measures to regulate the exercise of such rights."

Plaintiffs, plaintiff-intervenor the United States, defendants, and defendant-intervenors (nine counties and six landowners) were parties to Phase I. After trial,

the Court "declared and adjudged that the privilege guaranteed to the Chippewa of hunting, fishing and gathering the wild rice upon the lands, the rivers and the lakes included within the territory ceded to the United States by the Treaty of 1837 continues to exist." *Mille Lacs Band v. Minnesota*, 861 F. Supp. 784, 841 (D. Minn. 1994).

Second, the Court defined the nature and the scope of the rights and determined whether they extend to private lands. It held *inter alia* that: (1) "exercise of the usufructuary rights should be limited to lands in the ceded territory that are not privately owned because no right of access was included in the privilege"[1]; (2) the treaty contains no right to harvest pine timber but otherwise secures to the Chippewa the right to harvest "all of their surrounding natural resources"; (3) the treaty does not impose "any restrictions on the time, place or manner of the exercise of the privilege"; (4) the treaty permits "continued use of the privilege for commercial purposes," and (5) the treaty does not limit the Chippewa to "any particular techniques, methods, devices or gear." *Id.* at 836 and 838.

Third, the Court delineated "the legal standards for state regulation" of the hunting, fishing and gathering privilege, while reserving for Phase II "the application of these standards to particular regulations and any allocation issues." *Id.* at 838-39. The Court held that the State

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[1] The Court explained that "[i]n this sense, privately owned lands do not include public lands formerly in private ownership or private lands open to public hunting, fishing, and gathering." *Id.* at 836. The parties dispute the scope of this statement and will address it in a summary judgment motion.

may regulate the exercise of the rights "in the interests of conservation, 'provided the regulation meets appropriate standards and does not discriminate against the Indians.' " Similarly, the State – may regulate "to ensure public health and safety if the regulations do not discriminate against the Indians and are 'reasonable and necessary to prevent or ameliorate a substantial risk to the public health or safety.' " In both cases, the Court specified the showings the State must make in order to satisfy these standards. And, the Court held that "[t]he state may not impose its own regulations if the Band can effectively self regulate and if tribal regulations are adequate to meet conservation, public health, and public safety needs." *Id.*

On September 23, 1994, the Court entered a pre-trial order for Phase II. Pursuant to paragraphs 1, 3 and 4 of that order, the parties exchanged the following pre-trial statements.

– Plaintiffs and plaintiff-intervenor the United States filed a Joint Preliminary Pre-Trial Statement for Phase II on November 23, 1994. The joint statement identified specific State statutes and regulations that the Mille Lacs Band and the United States contend violate the standards for state regulation set forth in the Court's Phase I decision. They attached to their joint statement a proposed Band conservation code to regulate hunting, fishing and gathering by Band members in the Minnesota Ceded Territory.

– Defendants and defendant-intervenors each filed separate Preliminary Pre-Trial Statements for Phase II on January 13, 1995. The State's pre-trial statement set forth State laws and regulations it contends are applicable to

Band members under the 1837 Treaty, and the State's concerns regarding various provisions of the Band's proposed conservation code.

– On March 17, 1995, the Mille Lacs Band and the United States filed revisions to their joint pre-trial statement, attaching a revised Band conservation code and a revised list of the State statutes and regulations they contend violate the standards in the Phase I decision. The revised conservation code was submitted on behalf of the six Wisconsin Bands who were then applying for intervention as well as the Mille Lacs Band. It contained numerous revisions which were intended to address concerns raised by the State in its pre-trial statement.

The six Wisconsin Bands were granted leave to intervene on March 23, 1995. On April 26, 1995, the Court entered a revised Phase II pre-trial order. It established an August 1, 1995, deadline for filing dispositive motions regarding any defenses against the Wisconsin Bands' claims for hunting, fishing and gathering rights under the 1837 Treaty. Accordingly, defendant and defendant-intervenors filed motions for summary judgment on or around August 1, 1995, regarding the continued existence, nature and scope of the Wisconsin Bands' rights in the Minnesota Ceded Territory under the 1837 Treaty. The court ruled on these motions on March 29, 1996, finding that the Wisconsin Bands' rights are identical to those of the Mille Lacs Band.

Since the exchange of the November 1994 and March 1995 pre-trial statements, and the conclusion of written and oral discovery, the plaintiffs, plaintiff-intervenors, State defendants and their respective technical advisors

have held numerous meetings and exchanged voluminous information in an effort to narrow the issues raised in the pre-trial statements.

The participating parties have made substantial progress in narrowing the Phase II issues. As a result of their efforts, the plaintiff and plaintiff-intervenor Bands have prepared a revised Conservation Code, which is attached as Exhibit A hereto, and a series of Commissioner's Orders to implement that Code, which are attached as Exhibit B hereto. In addition, the Bands have unilaterally drawn up a series of measures to govern their management of their members' hunting, fishing and gathering activities, which are set forth in the Management Plans attached as Exhibit C hereto. In addition, the Bands and the State have agreed to a series of Protocols, attached as Exhibit D hereto, to coordinate harvest management and resource assessment in the Minnesota Ceded Territory. Finally, in reliance on the revised Band Conservation Code, Commissioner's Orders, Management Plans and Protocols, the State has agreed that the statutes and regulations listed as "Resolved" in Exhibit E hereto do not, under present circumstances, meet the standards for State regulation in the Court's Phase I decision, leaving only the statutes and regulations listed in Exhibit E as "Unresolved" at issue in this phase of the case.

II. STIPULATION.

Plaintiffs, plaintiff-intervenors and defendants (the "Stipulating Parties") hereby stipulate and agree that:

1. Upon adoption of the Band Code, including authorization of State of Minnesota Department of Natural Resources personnel to enforce the provisions of such Code, issuance of the Commissioner's Orders and approval of the Management Plans and Protocols attached as Exhibits A, B, C and D hereto by one or more of the plaintiff or plaintiff-intervenor Bands, and enforcement of the same, the application to such Bands and their members of the State statutes and regulations listed in Exhibit E hereto as "Resolved", to the extent set forth in Exhibit E, will not be necessary for conservation, public health or safety as those terms were used by the Court in its Phase I decision, and will therefore be unlawful. The only particular State statutes and regulations whose application to Band members remains in dispute in the current phase of this case are listed in Exhibit E as "Unresolved". The positions of the Stipulating Parties with respect to those statutes and regulations are indicated in the Comments column in Exhibit E. Those issues will be presented to the Court for resolution on summary judgment motion or at trial.

2. The requirements of this stipulation shall become effective immediately upon entry of the court's final order.

3. If any Band fails to adopt a conforming conservation code, attempts to rescind or otherwise nullify its entire code, or substantially fails to enforce the provisions of its code, Band members harvesting within the Minnesota Ceded Territory shall be subject to applicable state laws and regulations. The State reserves the right to make objections to any individual provision changes sought by

the Bands in accordance with the procedures set forth in the Protocols set forth in Exhibit D hereto.

4. The State and the Bands stipulate that there shall be fair, uniform and diligent enforcement of the conforming conservation codes pursuant to this Court's final order.

5. This stipulation is binding upon all Stipulating Parties, their successors in office, their agents, employees and representatives, and any and all persons claiming an interest through these parties.

6. All records of tribal courts involving the exercise of treaty harvest rights shall be open for inspection and copying by the State Department of Natural Resources at reasonable times upon reasonable notice. The actual proceedings in said courts shall also be open to the State Department of Natural Resources. Any such records or proceedings that are protected by tribal law as confidential, such as juvenile records, shall also be kept confidential by the State.

7. It is the express intention of all Bands and the State that their respective enforcement officers work cooperatively in enforcing Band conservation codes. The Minnesota Department of Natural Resources agrees to make good faith efforts to coordinate with Band conservation wardens and Great Lakes Indian Fish and Wildlife Commission wardens duly appointed by a Band, in their enforcement activities. The Bands agree to make good faith efforts to coordinate with State Department of Natural Resources Conservation Officers in their enforcement activities.

8. The Bands and Great Lakes Indian Fish and Wildlife Commission Enforcement and Biological staffs shall share harvest, registration and similar data with the Minnesota Department of Natural Resources enforcement personnel in a timely and professional manner in accordance with Protocol No. 4.

9. The Stipulating Parties shall comply with the terms and provisions of the Protocols set forth in Exhibit D hereto including, without limitation, the procedures for resolving future disputes regarding the application of particular State statutes and regulations to Band members.

10. In addition to the statutes and rules noted as "unresolved" in Exhibit E, this Stipulation does not resolve the following issues: a) resource allocation issues presented in this phase of the case; b) which private lands may be available for Band harvest under their Conservation Code; c) natural resource management decision making authority; and d) whether the Bands may exercise their treaty rights throughout those lakes that are only partially within the Minnesota Ceded Territory and, if not, how to determine the harvest available to the Bands in such lakes. Those issues will be presented to the Court for resolution on summary judgment motion or at trial.

11. Nothing in this Stipulation shall prejudice the rights of any party to appeal the court's Phase I decision or its rulings on the continued existence, nature or scope of the Wisconsin Bands' treaty rights, and this Stipulation shall be subject to, and may be modified or rescinded based on, the outcome of any such appeal.

12. The stipulating parties agree that this court should retain continuing jurisdiction over this case to facilitate the implementation of the court's orders and decrees herein, to resolve any disputes among the parties with respect thereto, or to address other matters as the court may deem appropriate.

13. The court may enter an order incorporating the terms of this Stipulation.

Date: July 12, 1996

/s/ Marc Slonim
MARC D. SLONIM
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Date: June 26, 1996

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Date: July 18, 1996

/s/ M. Joan Warren
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Attorney for Plaintiff-Intervenor,
Lac Courte Oreilles Indians

Date: 6-18-96

/s/ Milton Rosenberg
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Red Cliff Band of Lake Superior

Date: June 25, 1996 /s/ Kevin Potter
KEVIN POTTER
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Date: 7/16/96 /s/ James M. Jannetta
JAMES M. JANNETTA
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Bad River Band of Lake Superior

Date: June 27, 1996 /s/ Carol Brown-Biermeier
CAROL BROWN-BIERMEIER
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Date: June 11, 1996 /s/ William A. White
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Date: June 14, 1996 /s/ Willam A. Szotkowski
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REVISED 6/5/96

Protocol #1

MINNESOTA 1837 CEDED TERRITORY FISHERIES COMMITTEE

A. Committee Purposes and Tasks.

1. This protocol between the State of Minnesota and its Department of Natural Resources ("State") and the plaintiff and plaintiff-intervenor Bands in *Mille Lacs Band v. Minnesota*, No. 3-94-1226 (D. Minn.) ("Bands") establishes an 1837 Ceded Territory Fisheries Committee. The purpose of the Fisheries Committee is to facilitate free and open communications between the State and the Bands regarding natural resource management within the boundaries of the 1837 Ceded Territory. The Bands and the State will encourage such communications to the greatest extent practicable, and nothing herein shall limit such communications inside or outside formal Committee meetings. The State and the Bands believe that such communication will benefit natural resources management in the 1837 Ceded Territory, and will help avoid (or at least minimize the number and complexity of) disputes that will require judicial resolution.

2. As set forth below, the Fisheries Committee will develop, analyze and review data relevant to fish management within the 1837 Ceded Territory; provide for coordination among State and Band fisheries surveys, sampling and research in the 1837 Ceded Territory; consider harvestable surplus levels; discuss proposed changes to State or Band fisheries laws or regulations; and address other fisheries management issues. The Committee will perform these tasks in accordance with

the provisions of this Protocol and Protocol Nos. 4 (Information Exchange Procedures) and 5 (Natural Resource Management).

B. Composition of the Committee; Working Groups.

1. The Committee shall be composed of qualified fisheries scientists and managers designated by the State and the Bands. Representatives from the State could include: a fisheries treaty biologist, one regional fisheries manager, five area fisheries supervisors from within the 1837 Ceded Territory, and the Mille Lacs big lake specialist. Representatives from the Bands could include Band natural resource officials, staff and consultants, and Great Lakes Indian Fish and Wildlife Commission [GLIFWC] personnel. Other State, Band or Federal experts or representatives may be invited by the State or the Bands to attend as necessary to discuss and resolve a particular issue. A Band and State representative for enforcement/public safety issues is encouraged to attend the meetings to address enforcement-related concerns.

2. The State and the Bands will each appoint a Committee co-chair to coordinate communication and planning for the Committee's work.

3. The Committee may appoint one or more working groups to address specified issues. The composition and functions of a working group shall be set forth in a written document approved by consensus of the Committee.

C. Meetings.

1. The Fisheries Committee should meet at least twice per year. The timing of Committee meetings will be variable depending on the species or issues needing discussion, and will be held by mutual consent of the parties. The meetings will be hosted alternately by the State and Bands, with the host responsible for any direct meeting costs and for chairing the meeting. Additional meetings can be called by the State or the Bands as issues needing discussion or resolution arise. A working group may meet as often as is appropriate in light of its designated functions.

2. Unless the parties agree otherwise, the State and the Bands shall exchange the following items at least 30 days prior to each Committee meeting. The information exchange required by this paragraph shall be in addition to and complimentary with the exchange of information required by other protocols (see especially Protocol No. 4, Information Exchange Procedures).

a. Each party shall produce a list of items it wishes to address at the meeting. The co-chairs shall prepare and circulate at least 14 days before the meeting a consolidated agenda incorporating all items listed by the parties, and a list of those representatives that the parties' anticipate will be attending the meeting on their behalf.

b. Each party shall produce all fisheries harvest and survey data for the 1837 Ceded Territory collected since the last meeting. This shall include raw data in standard machine readable form upon request, as well as any summaries or analyses generated from the data. The

data should include all State and Band harvest data pertaining to the 1837 Ceded Territory, and all data from surveys, sampling or research conducted within the 1837 Ceded Territory.

c. Each party shall produce a preliminary written analysis of any proposal or position it intends to present at the meeting. Such analyses may be revised in light of data or analyses received from the other party or other new information. The revised analyses shall be presented at or before the meeting. Such analyses may be revised further in light of discussions at the meeting.

D. Committee Functions.

The Committee shall:

1. Discuss the fisheries harvest and survey data that have been collected since the last meeting, and the implications of such data for fisheries management and harvests.

2. Discuss means to coordinate all fisheries surveys, sampling and research to be conducted within the 1837 Ceded Territory, and share information on all 1837 Ceded Territory fisheries survey, sampling and research projects. This should include:

a. Review of all new or outstanding fisheries survey, sampling or research proposals, including any outstanding Band proposal that requires State approval pursuant to Protocol No. 5; and

b. Making recommendations to the parties regarding revisions to or discontinuation of on-going surveys, sampling, or research, or the initiation of new surveys, sampling or research, within the 1837 Ceded Territory, including recommendations regarding which water bodies be surveyed, by what method, and by whom.

3. Develop recommendations for harvestable surplus levels by species and lake or river segment, in accordance with Protocol No. 5.

4. Discuss proposed changes in State or Bands fisheries laws and regulations.

5. Address other fisheries management issues, including technical and coordination issues, of interest to the parties.

E. Committee Decision-making, Meeting Reports and Dispute Resolution.

1. The representatives of the Bands and the State serving on the Committee shall strive for consensus on all issues, and no Committee decision or recommendation on a particular issue shall be made in the absence of a consensus on that issue. As used here, "consensus" means the agreement of all such representatives present at a meeting, provided that a consensus shall be obtained if some representatives disagree but choose not to object formally to the agreement of all other representatives. All Committee decisions and recommendations shall be subject to the opinions, orders and decrees in *Mille Lacs Band*

v. Minnesota, No. 3-94-1226 (D. Minn), and any protocols, agreements or stipulations among the parties.

2. An agreed Meeting Report shall be prepared by the Co-Chairs upon the conclusion of a Committee Meeting. The report shall include the consolidated meeting agenda, a list of participants, a brief summary of the presentations and discussions, a statement of all decisions and recommendations made by the Committee, and a list of all issues on which consensus was not reached, including a concise statement of the parties' respective positions with respect to such issues. All preliminary and revised analyses prepared in accordance with ¶ C.2.c. above shall be included as appendices to the report. A final, typed version of the Meeting Report shall be prepared and circulated by the Co-Chairs within 10 days after the meeting. All preliminary and revised analyses prepared in accordance with ¶ C.2.c. above shall be included as appendices to the final, typed version of the report.

3. Issues on which consensus was not reached by the Committee will be referred to the State Fisheries Chief and to the Bands' designated fisheries manager(s) upon the written request of the State or the Bands. These individuals shall strive to reach consensus on the issue.

4. If no consensus is reached, upon the written request of the State or the Bands, the parties shall jointly choose a mediator to convene and conduct a mediation session to seek consensus on the issue. The cost of the mediation shall be borne equally by the State and the Bands. The State Fish and Wildlife Director and the State DNR Commissioner, or their appointed representatives,

shall attend the mediation session on behalf of the State. The Mille Lacs Commissioner of Natural Resources, the GLIFWC Biological Services Director and other designated Band officials, or their appointed representatives, shall attend the mediation session on behalf of the Bands. The State and the Bands may also invite such other experts as may be needed to reach resolution of the matter.

5. If consensus still cannot be reached, the parties have the option of invoking the court's continuing jurisdiction to seek resolution of the matter, unless the Court has determined that one party has authority to resolve the matter unilaterally and that its decision cannot be challenged in Court.[1]

6. Except for those situations described in ¶ 7 below, any dispute between the parties about fisheries biology or resource issues must be brought to the Fisheries Committee and submitted to a mediator for assistance, if necessary, prior to seeking a court resolution.

7. There may be a matter in dispute that, because of imminent threat to a resource or public safety or imminent loss of harvest opportunity, cannot be handled

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[1] The State contends it has authority to resolve disputes over the harvestable surplus of a species unilaterally, and that its decision cannot be challenged by the Bands in court. The Bands dispute this. They propose that, in the event of a dispute over harvestable surplus levels, a neutral fisheries expert, jointly selected by the State and the Bands, be given authority to determine such levels on an interim basis, pending resolution of the matter by the parties or the court.

through the established committee and mediation process. In those situations, before seeking judicial relief a party shall give at least such notice to the opposing party of the issue in dispute as is required by the Federal Rules of Civil Procedure for applications for temporary restraining orders.

F. Public Information.

The parties shall cooperate in making Meeting Reports and all analyses and technical data developed by or for the Committee available to the public. As a professional courtesy, Committee members shall notify each other before issuing press releases or other statements to the media.

REVISED 6/5/96

Protocol # 2

MINNESOTA 1837 CEDED TERRITORY WILDLIFE AND PLANT RESOURCES COMMITTEE

A. Committee Purposes and Tasks.

1. This protocol between the State of Minnesota and its Department of Natural Resources ("State") and the plaintiff and plaintiff-intervenor Bands in *Mille Lacs Band v. Minnesota*, No. 3-94-1226 (D. Minn.) ("Bands") establishes an 1837 Ceded Territory Wildlife and Plant Resources Committee. The purpose of the Wildlife and Plant Resources Committee is to facilitate free and open

communications between the State and the Bands regarding natural resource management within the boundaries of the 1837 Ceded Territory. The Bands and the State will encourage such communications to the greatest extent practicable, and nothing herein shall limit such communications inside or outside formal Committee meetings. The State and the Bands believe that such communication will benefit natural resources management in the 1837 Ceded Territory, and will help avoid (or at least minimize the number and complexity of) disputes that will require judicial resolution.

2. As set forth below, the Wildlife and Plant Resources Committee will develop, analyze and review data relevant to wildlife and plant management within the 1837 Ceded Territory; provide for coordination among State and Band studies and surveys in the 1837 Ceded Territory; consider harvestable surplus levels; review proposed changes in Band and State management units; review proposed changes in Band and State hunting, trapping, and gathering regulations and codes; and address other wildlife and plant management issues. The Committee will perform these tasks in accordance with the provisions of this Protocol and Protocol Nos. 4 (Information Exchange Procedures) and 5 (Natural Resources Management).

B. Composition of the Committee; Working Groups.

1. The Wildlife and Plant Resources Committee shall be composed of qualified wildlife and plant scientists and managers designated by the State and the Bands. Representatives from the State could include:

Wildlife Program Manager, Wildlife Research and Surveys Manager, Regional Wildlife Manager, Forest Wildlife Program Leader, Farmland Wildlife Program Leader, Furbearer Program Leader, Forest Wildlife Populations and Survey Group, Scientific and Natural Areas Program, Farmland Wildlife Populations and Surveys Group, Wetland Wildlife Populations and Survey Group, and Nongame/Natural Heritage Program. Attendance and participation by the above people would vary depending on the agenda of meetings. Representatives from the Bands could include Band natural resource officials, staff or consultants, and Great Lakes Indian Fish and Wildlife Commission [GLIFWC] personnel. Other State, Band or Federal experts or representatives may be invited by the State or the Bands to attend as necessary to discuss or resolve a particular issue. A Band and State representative for enforcement/public safety issues is encouraged to attend the meetings to address enforcement-related concerns.

2. The State and the Bands will each appoint a Committee co-chair to coordinate communication and planning for the Committee's work.

3. The Committee may appoint one or more working groups to address specified issues. The composition and functions of a working group shall be set forth in a written document approved by consensus of the Committee.

C. Meetings.

1. The Wildlife and Plant Resources Committee will meet at least once each year. The timing of Committee

meetings will be variable depending on the species or issues needing discussion, and will be held by mutual consent of the parties. Issues will be addressed as needed. The meetings will be hosted alternately by the State and Bands, with the host responsible for any direct meeting costs and for chairing the meetings. A working group may meet as often as is appropriate in light of its designated functions.

2. Unless the parties agree otherwise, the State and the Bands shall exchange the following items at least 30 days prior to each Committee meeting. The information exchange required by this paragraph shall be in addition to and complimentary with the exchange of information required by other protocols (see especially Protocol No. 4, Information Exchange Procedures).

a. Each party shall produce a list of items it wishes to address at the meeting. The co-chairs shall prepare and circulate at least 14 days before the meeting a consolidated agenda incorporating all items listed by the partiess, and a list of those representatives that the parties' anticipate will be attending the meeting on their behalf.

b. Each party shall produce all wildlife and plant harvest and survey data for the 1837 Ceded Territory collected since the last meeting that has not previously been exchanged. This shall include raw data in standard machine readable form upon request, as well as any summaries or analyses generated from the data. The data should include all State and Band harvest data pertaining to the 1837 Ceded Territory, and all data from

studies, surveys or research conducted within the 1837 Ceded Territory.

c. Each party shall produce a preliminary written analysis of any proposal or position it intends to present at the meeting. Such analyses may be revised in light of data or analyses received from the other party or other new information. The revised analyses shall be presented at or before the meeting. Such analyses may be revised further in light of discussions at the meeting.

D. Committee Functions.

The Committee shall:

1. Discuss the wildlife and plant harvest and survey data that have been collected since the last meeting, and the implications of such data for wildlife and plant management and harvests.

2. Discuss means to coordinate all wildlife and plant studies, surveys or research to be conducted in the 1837 Ceded Territory, and share information on all 1837 Ceded Territory Wildlife and plant studies, surveys and research projects. This should include:

a. Review of all new or outstanding wildlife or plant study, survey or research proposal, including any outstanding Band proposal that requires State approval pursuant to Protocol No. 5; and

b. Making recommendations to the parties regarding revisions to or discontinuation of on-going studies, surveys or research, or the initiation of new studies, surveys or research, within the 1837 Ceded Territory.

3. Develop recommendations on harvestable surplus numbers by species and management area in accordance with Protocol No. 5.

4. Discuss proposed changes in State or Band management units and hunting, trapping and gathering regulations and codes.

5. Address other wildlife and plant management issues, including technical and coordination issues, of interest to the parties.

E. Committee Decision-making, and Meeting Reports and Dispute Resolution.

1. The representatives of the Bands and the State serving on the Committee shall strive for consensus on all issues, and no Committee decision or recommendation on a particular issue shall be made in the absence of a consensus on that issue. As used here, "consensus" means the agreement of all such representatives present at a meeting, provided that a consensus shall be obtained if some representatives disagree but choose not to object formally to the agreement of all other representatives. All Committee decisions and recommendations shall be subject to the opinions, orders and decrees in *Mille Lacs Band v. Minnesota*, No. 3-94-1226 (D. Minn), and any protocols, agreements or stipulations among the parties.

2. An agreed Meeting Report shall be prepared by the Co-Chairs upon the conclusion of a Committee Meeting. The report shall include the consolidated meeting agenda, a list of participants, a brief summary of the

presentations and discussions, a statement of all decisions and recommendations made by the Committee, and a list of all issues on which consensus was not reached, including a concise statement of the parties' respective positions with respect to such issues. A final, typed version of the Meeting Report shall be prepared and circulated by the Co-Chairs within 10 days after the meeting. All preliminary and revised analyses prepared in accordance with ¶ C.2.c. above shall be included as appendices to the final, typed version of the report.

3. Issues on which consensus was not reached by the Committee will be referred to the State Wildlife Chief and to the Bands' designated wildlife and plant manager(s) upon the written request of the State or the Bands. These individuals shall strive to reach consensus on the issue.

4. If no consensus is reached, upon the written request of the State or the Bands the parties shall jointly choose a mediator to convene and conduct a mediation session to seek consensus on the issue. The cost of the mediation shall be borne equally by the State and the Bands. The State Fish and Wildlife Director and the State DNR Commissioner, or their appointed representatives, shall attend the mediation session on behalf of the State. The Mille Lacs Commissioner of Natural Resources, GLIFWC Biological Services Director and other designated Band officials, or their appointed representatives, shall attend the mediation session on behalf of the Bands. The State and the Bands may also invite such other experts as may be needed to reach resolution of the matter.

5. If consensus still cannot be reached, the parties have the option of involving the court's continuing jurisdiction to seek resolution of the matter, unless the Court has determined that one party has authority to resolve the matter unilaterally and that its decision cannot be challenged in Court.[1]

6. Except for those situations described in ¶ 7 below, any dispute between the parties about wildlife or plant biology or resources must be brought to the Wildlife and Plant Resources Committee and submitted to a mediator for assistance, if necessary, prior to seeking a court resolution.

7. There may be a matter in dispute that, because of imminent threat to a resource or public safety or imminent loss of harvest opportunity, cannot be handled through the established committee and mediation process. In those situations, before seeking judicial relief a party shall give at least such notice to the opposing party of the issue in dispute as is required by the Federal Rules of Civil Procedure for applications for temporary restraining orders.

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[1] The State contends it has authority to resolve disputes over the harvestable surplus of a species unilaterally, and that its decision cannot be challenged in Court. The Bands dispute this. They propose that, in the event of a dispute over harvestable surplus levels, a neutral wildlife expert, jointly selected by the State and the Bands, be given authority to determine such levels on an interim basis, pending resolution of the matter by the parties or the court.

F. Public Information.

The parties shall cooperate in making Meeting Reports and all analyses and technical data developed by or for the Committee available to the public. As a professional courtesy, Committee members shall notify each other before issuing press releases or other statements to the media.

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Protocol # 3

Band Participation in Special Deer Hunts

The following protocol is established to guide Band participation in special deer hunts conducted by the State in the 1837 Ceded Territory. Special deer hunts are those hunts in state parks, refuges, and other areas where deer hunting is not normally allowed, and where the State contends the number of hunters and the duration of their access is strictly limited for public safety and conservation purposes.

1. The State currently limits overall hunter numbers and sets harvest objectives for special hunt areas. The Bands do not contend that the current methods used by the State to assess deer populations, set deer population goals, and determine harvest objectives for special hunts are in violation of their treaty rights, and understand the State intends to continue using these methods. If the

Bands develop concerns regarding the use of those methods, they may present their concerns to the 1837 Ceded Territory Wildlife and Plant Resources Committee, and seek to resolve their concerns through the committee and mediation process.

2. By June 10 of each year, the State shall notify the Bands of its determination of maximum allowable hunter densities, open hunting dates and hours, special regulations, and harvest objectives for any special deer hunts to be carried out within the 1837 Ceded Territory.

3. By August 10 of each year, the Bands will notify the State of Band participation in each hunt, specifying both Band hunter numbers and harvest, which shall not exceed fifty percent of the total deer harvest available for each special hunt area. The Bands will determine for themselves how to allocate tribal hunter participation in the special hunts.

4. Both State and Band hunters will be limited to hunting during those days and hours set by the State, and will be required to comply with any and all of the special hunt regulations, unless otherwise agreed or adjusted through the committee or mediation process or by court order. The Bands will also impose upon their hunters the State's prohibition on the use of bait in state parks.

5. The Bands will provide the State with information on the Band deer harvest from special hunt areas including total deer harvested by age (fawn vs. adult) and sex (male vs. female), and any additional biological information required of state hunters, by January 15 of each year. Any harvest taken during a special hunt will count toward the Bands' annual percentage share (as

determined by the court), but shall not count toward any Band declaration or quota which is less than that percentage.

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Protocol # 4

INFORMATION EXCHANGE PROCEDURES

This protocol outlines the respective obligations and responsibilities of the State and the Bands for the timely and complete exchange of information related to: (1) natural resource management and harvest within the Minnesota portion of the 1837 Ceded Territory (hereafter, the Ceded Territory); and (2) changes in State or Band regulation and management of natural resource harvesting.

I. INFORMATION RELATED TO NATURAL RESOURCE MANAGEMENT AND HARVEST.

The State and Bands agree to the following timetable for the exchange of information needed for ongoing analysis and management of the resources. Information to be furnished by the Bands to the State shall be provided in writing as follows: (a) wildlife information, to the State DNR Wildlife Program Manager in St. Paul; (b) fisheries information, to the State DNR Fisheries Treaty Biologist; and (c) plant information, to the State DNR Ecological Services Section Chief in St. Paul. All information to be

furnished by the State to the Bands shall be provided in writing to the Mille Lacs Band's Commissioner of Natural Resources and to the Biological Services Director of the Great Lakes Indian Fish and Wildlife Commission (GLIFWC).

A. Wildlife Information.

1. Deer.

Deer harvest data. The State and the Bands agree to collect consistent information on sex (male or female) and age (adult or fawn) of deer harvested. Information on the quantity, distribution, and composition of deer harvest in the Ceded Territory will be exchanged by March 1 each year.

Deer populations, harvestable surplus, quotas and management plans. The State and the Bands will exchange any deer population information collected on an annual basis. The harvestable surplus calculations for antlerless deer will be completed in accordance with Protocol No. 5 by June 10 each year. The Bands will provide to the State a written declaration of the treaty quota for antlerless deer in each permit area (or portion thereof) within the Ceded Territory by August 10 each year. The State will provide to the Bands a written statement of its management plans for the non-treaty harvest in such areas by September 10 each year.

2. Bear.

Bear harvest data. The State and the Bands agree to collect and exchange biological information on sex and

age of bear harvested in the Ceded Territory. Information on the quantity, distribution and composition of bear harvest, including bears killed while causing damage to property, will be exchanged by December 1 each year.

Bear populations, harvestable surplus, quotas and management plans. The State and the Bands will exchange any bear population information collected on an annual basis. The harvestable surplus calculations for bear in will be completed in accordance with Protocol No. 5 by March 1 each year. The Bands will provide to the State a written declaration of the treaty quotas for bears in the portions of Bear Management Units 45 and 51 that are within the Ceded Territory by May 10. The State will provide to the Bands a written statement of its management plans for the non-treaty harvest in such areas by June 1.

3. Wild Turkey.

Wild turkey harvest data. The State and the Bands agree to collect and exchange information on wild turkeys harvested. Information on the quantity and distribution of wild turkey harvest will be exchanged by July 1 each year.

Wild turkey populations, harvestable surplus, quotas and management plans. The State and the Bands will exchange any wild turkey population information collected. The harvestable surplus calculations for wild turkey will be completed in accordance with Protocol No. 5 by August 1 each year. The Bands will provide to the State a written declaration of treaty quotas for wild turkey for each permit area (or portion thereof) within the Ceded Territory by October 1. The State will provide to the Bands a

written statement of its management plans for the non-treaty harvest in such areas by November 1.

4. Furbearers.

Furbearer harvest data. The State and the Bands agree to collect and exchange information on furbearer harvests. Information on the quantity and distribution of registered furbearer harvest, including furbearers killed while causing damage to property, will be exchanged by April 1 each year. If possible, the Bands will obtain information on a voluntary basis from Band members identifying the township and range of the county where the animal was killed.

Furbearer populations, harvestable surplus, quotas and management plans. The State and the Bands will exchange any furbearer population information collected. The harvestable surplus calculations for registered furbearers (bobcat, fisher, marten, lynx and otter) will be completed in accordance with Protocol No. 5 by May 1 each year. The Bands will provide to the State a written declaration of treaty quotas for registered furbearers for which they have an open season (presently, bobcat, fisher and otter) by June 15. The State will provide to the Bands a written statement of its management plans for the non-treaty harvest of these animals by July 15.

CITES Tags. The State will provide to the Bands enough CITES tags to ensure the registration of legally harvested otter and bobcat for the upcoming hunting and trapping season. The Bands will use the CITES tags in lieu of, or in addition to, any other Band registration tags for these species. The Bands will report and account for

the CITES tags they have used during the previous hunting and trapping seasons. The Bands will return to the State or, as authorized by the State, properly destroy any unused tags.

5. Waterfowl.

Waterfowl harvest data. The State and Bands will collect information on waterfowl harvests. Information on duck and goose harvests will be exchanged by July 31.

Waterfowl population data. The State. and the Bands will collect information on waterfowl breeding populations and recovery data and exchange any such data that is not available at Mississippi Flyway Council meetings by July 31.

Incidental capture of waterfowl in muskrat sets and in gill nets. The Bands will monitor the capture of waterfowl in March muskrat trapping and report to the State the estimated numbers of any incidental waterfowl mortality. The Bands will also monitor the capture of diving birds in gill nets at any time of year, and report to the State the estimated numbers of any incidental mortality. The need to continue the monitoring and reports provided for in this paragraph will be reviewed by the 1837 Ceded Territory Wildlife and Plant Resources Committee after three years.

6. Moose.

Moose harvest data. The State and the Bands will collect data on moose harvested in the Ceded Territory and will exchange moose harvest information by January 1.

Moose population data. The State and the Bands will jointly gather information about moose populations in the Ceded Territory, including the population in Nemadji State Forest.

7. Game Birds.

Game bird harvest data. The State and the Bands will monitor total harvests of pheasants, ruffed grouse and sharp-tailed grouse in the Ceded Territory, and exchange such information by September 1.

Game bird population data. The State and the Bands will exchange information on game bird populations.

8. Registration Information.

Any and all registration information maintained by the Bands (individually or through GLIFWC) shall be made available for inspection by a State enforcement officer upon request, including for any registered animal the hunter's name, address, and tag number, the zone(s) in which the hunter was licensed to harvest the animal, and the date and location of the kill. Such information shall be used only for enforcement purposes, and the name, address and tag number of the hunter shall be confidential except as needed for enforcement purposes.

B. Emergency Taking of Endangered or Threatened Species.

The Bands will report to the State any emergency taking of endangered or threatened species, as defined in

the 1837 Treaty Conservation Codes for the Minnesota Ceded Territory, § 3.25, within 48 hours of the taking. The State and the Bands will exchange any other information on any direct or incidental taking of endangered or threatened species on an annual basis.

C. **Ginseng Sales and Exportation.**

The Bands allow for the purchase and sale of wild ginseng by Band members. By March 1 of each year, the Bands shall provide a written report on wild ginseng transactions to the State DNR Wildlife Section Chief in St. Paul, including: (1) the date of each transaction; and (2) the quantity by weight of wild ginseng sold. The State and the Bands will exchange any other information regarding wild ginseng by March 1 each year.

Information on ginseng transactions maintained by the Bands (individually or through GLIFWC) pursuant to Sections 3.26 and 12.05 of the 1837 Treaty Conservation Codes shall be made available for inspection by a State enforcement officer upon request. Such information shall be used only for enforcement purposes, and the names of parties to such transactions shall be confidential except as needed for enforcement purposes.

D. **Fisheries Information.**

The Bands shall monitor their members' harvest of fish (including commercial harvests of non-game species) in accordance with their Interim Treaty Fisheries Management Plan and Conservation Codes. The State will supply

durable license tags for dark houses for the Bands' use under § 9.13(5) of the Codes.

The Bands' proposed Conservation Code currently requires a monitor at each gillnet lift and each boat landing where openwater spearing is conducted. The Bands agree to implement this monitoring regime on a three-year trial basis and, in addition, to permit State biologists to participate in monitoring these activities on a random basis. The Bands may propose appropriate revisions to this monitoring regime after the three-year trial period. Such proposals will be made through the Minnesota 1837 Ceded Territory Fisheries Committee and will be subject to the dispute resolution process in Protocol No. 1.

The Bands will report the following data to the State:

for walleye and northern pike harvested in open-water spear fisheries: (1) effort (in boat-hours by waterbody by date); and (2) total harvest (in numbers and aggregate pounds by species by waterbody by date);

for walleye and other species harvested in gillnet fisheries: (1) effort (in feet of net and numbers of hours fished, per mesh size, by waterbody by date) and (2) total harvest (in numbers and aggregate pounds by species by mesh size by waterbody by date); and

for walleye and other species harvested in other net fisheries: (1) effort (e.g. trap nights, seine hauls, etc.) by waterbody by date; and ((2) total harvest (in numbers and aggregate pounds by species by gear by waterbody by date).

For an initial two-year trial period, this data will be reported to the State on a bi-weekly basis from March 1 to

May 31, and on a monthly basis during other times of the year.

The Bands will make reasonable efforts to obtain: (1) length and sex of walleye harvested in open-water spear and net fisheries (pursuant to the sampling regime in Sections II.B.8, III.B.7 and IV.B.3 of the Bands, Interim Treaty Fisheries Management Plan); (2) length and sex of all northern pike harvested in open-water spear fisheries; (3) length of all fish of all species other than walleye harvested in net fisheries (unless, given the level of harvest, a subsample is appropriate); (4) scales or spines to permit aging of ten (10) walleye per inch group from each open-water spear and net fishery in waters with naturally reproducing walleye populations (in the case of a prolonged net fishery, the sampling will be repeated at reasonable intervals); and (5) a cleithrum from each muskellunge harvested from the Mississippi River and the length of each such fish. All such data and any other fisheries data collected by the Bands will be reported to the State semi-annually during the two-year trial period.

The Minnesota 1837 Ceded Territory Fisheries Committee will review the above provisions for the collection and exchange of harvest and other data and propose appropriate revisions. The Committee will seek to ensure that data collection efforts are designed to maximize the collection of useful information while minimizing inconvenience to tribal fishers and the cost of data collection efforts.

The State will actively work with the Bands through the Fisheries Committee over the first five-years of tribal

harvest to coordinate data acquisition on harvest by different mesh size and filament type of gillnets, including using controlled experimental designs during the different fishing seasons. This will help provide information on Band fishing preferences, patterns and selectivity. The Fisheries Committee will review the data annually, and at the end of five years it will make recommendations about how the net mesh size will be handled in future years.

In addition to sharing information as provided above, any and all information maintained by the Bands (individually or through GLIFWC) on individual fishing permits, including the name and address of the permit holder, the permit number, and restrictions or limitations contained in the permit, shall be made available for inspection by a State enforcement officer upon request. Such information shall be used only for enforcement purposes, and the name, address and permit number shall be confidential except as needed for enforcement purposes.

The State will report any harvest data it obtains for non-treaty fisheries to the Bands. It will report effort (in angler hours per waterbody) and harvests (in numbers and pounds by species) obtained from creel surveys on a bi-weekly basis from March 1 to May 31, and on a monthly basis during other times of the year, for an initial two-year trial period. All other fisheries data collected by the State, will be reported to the Bands semiannually during the two-year trial period. The Minnesota 1837 Ceded Territory Fisheries Committee will review these provisions for the exchange of information and propose appropriate revisions.

The information to be reported by the Bands to the State and by the State to the Bands will be reported in a paper and an electronic format to be agreed upon by the parties. Either the Bands or the State may obtain raw data from the other upon request, provided there is a bona fide need for such data, and provided further that fishers' names and other identifying information may be withheld except where needed for enforcement purposes.

The State and the Bands shall exchange all harvest and population information gathered during each fishing season at least 30 days prior to the 1837 Ceded Territory Fisheries Committee meeting unless a shorter time frame is mutually agreed upon. The State and the Bands will undertake harvestable surplus calculations in accordance with Protocol No. 5. The State and the Band agree to provide any additional information requested by the other party through special requests if and when the information reasonably can be gathered.

E. Enforcement Information.

The Bands shall provide in writing to the State's Arrests and Confiscation Supervisor, in the Division of Enforcement in St. Paul, or another designee named by the State, any information on enforcement violations related to hunting while under the influence of alcohol or a controlled substance, or reports under Code Section 3.16 regarding hunting accidents. This includes all information regarding citations, arrests, and prosecutions under the Bands' Conservation Codes. The information shall include the name and Band identification number of any member cited or arrested, the type of citation or

charge, the circumstances giving rise to the citation or charge, and the ultimate disposition thereof. The information shall be provided to the State within 30 days of the disposition of the matter.

F. Ceremonial or Religious Harvests.

The Bands shall provide the following information to the State regarding permits issued pursuant to Section 1.09 of the Bands' Conservation Code: (1) the location by harvest management unit where the harvest is authorized; (2) the species and number of plant or animals authorized to be harvested; (3) the person or persons authorized to conduct the harvest; and (4) the length of time for which the permissible activity is authorized. At the conclusion of the harvesting, or no later than the end of the season, the Band shall notify the local area office of the Minnesota Department of Natural Resources of the following: (1) the number and species of the resource harvested; (2) the location or locations of the harvest; and (3) the date of the harvest.

II. CHANGES IN STATE OR BAND REGULATIONS AND MANAGEMENT OF NATURAL RESOURCE HARVESTING.

The State and the Bands recognize that changes in State and Band regulation[1] and management[2] of the

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[1] The term regulation is used broadly to include statutes, ordinances, administrative regulations and orders, etc.

[2] The term management is used broadly to include all matters addressed in the protocols and management plans

harvesting of natural resources in the Ceded Territory are inevitable. To facilitate open communication and minimize disputes arising from such changes, the State and the Bands agree to notify each other in writing of proposed changes to their *own* regulation or management of natural resource harvesting in the Ceded Territory, including an explanation of the rationale for the proposed change. In addition, the Bands and the State agree to submit any request for changes in the *other's* regulation or management of such harvesting in writing, including an explanation of the rationale for the request.[3] Any Band proposal to change its regulation of the harvesting of natural resources in the Ceded Territory in a manner that is less restrictive, or a State proposal that the Bands change such regulation to be more restrictive, than what is included within the final court order shall include an explanation of the changed circumstances or the data,

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developed by the parties, such as the definition of harvest management units, methodologies for determining harvestable surpluses, methodologies for monitoring harvests and resources, scientific investigations, and interactions between State and Band management agencies.

[3] This procedure shall include, but not be limited to, notice by the Band of any proposal to authorize falconry, and notice by the State of acquisitions, creations, or changes in the boundaries of or regulations pertaining to state parks, trails, water access sites, state forests and their use areas, wildlife management areas, scientific and natural areas, fish or aquatic management areas, experimental and special fish management waters, trout streams, designated muskellunge lakes, closed areas for fish preserves, spawning beds or research areas, game refuges, waterfowl feeding or resting areas, or controlled hunting zones in the Ceded Territory, and any State requests for conforming changes in Band law.

information or analyses (including, for example, information about the manner in or extent to which Band members seek to exercise their hunting, fishing and gathering rights) not currently available, which prompts the proposed change. The State and the Bands agree that the harvest levels in the Bands' Interim Fisheries and Wildlife Management Plans shall not be changed for the five-year period of those plans.

Except as otherwise provided in Part I above or in cases of emergency, such notices and requests shall be provided at least 60 days in advance of the desired effective date of the change. However, notices of land acquisitions by the State shall be provided within 60 days of completion of the acquisition. Within 30 days of receipt of any such notice or request, the receiving party or parties shall respond in writing, expressing any objections they may have to it and indicating any changes they may make to their own regulation or management of natural resource harvesting in light of it. The receiving party may make a written request for additional time, if needed, to complete this written response. The notices, requests and responses shall be furnished to the persons designated in Part I above.

Notice by the State of acquisitions, creations, or changes in the boundaries of state parks, trails, water access sites, state forests and their use areas, wildlife management areas, and scientific and natural areas will be given to the Bands for consideration and comment, but will not subject the State to further dispute resolution pursuant to protocols 1 and 2. However, requests by the State that the Bands extend their special use rules to such new or expanded areas will be subject to the committee

and dispute resolution processes set forth in those protocols.

If the State or the Bands do not object in writing to a proposed change within the thirty-day period prescribed above (or any agreed extension thereof), they will be deemed to have agreed to the proposal. If a written objection is made, the State and the Bands will attempt to resolve the matter in the appropriate 1837 Ceded Territory Resources Committee in accordance with the procedures set forth in Protocol Nos. 1 and 2. In the event a dispute is presented to the Court, it will be decided in accordance with applicable law. Thus, the Bands will not be required to change their regulation or management of natural resource harvesting in the Ceded Territory unless such a change is required under the conservation, public safety or public health standards established by the Court, and the State will not be required to change its regulation or management of natural resource harvesting in the Ceded Territory unless it is in violation of the Bands' treaty rights or other applicable law.

REVISED 6/5/96

Protocol # 5

NATURAL RESOURCE MANAGEMENT IN THE MINNESOTA PORTION OF THE 1837 CEDED TERRITORY

I. MANAGEMENT PRACTICES.

The State and the Bands have the responsibility to and will fairly regulate their respective harvest activities within the Minnesota portion of the 1837 Ceded Territory (hereafter, the Ceded Territory) in a manner consistent with sound conservation practices and the opinions and orders of the Court in this case. The State has a trust responsibility and authority to manage natural resources for the benefit of all current and future users consistent with the treaty harvest rights of the Bands, including the Bands' rights to regulate and protect Band member harvest opportunities, as affirmed by the federal court. The State acknowledges the Bands' traditional interest in natural resource stewardship, and shall give weight to the findings and advice of the Bands concerning natural resource management and conservation.

II. BIOLOGICAL INFORMATION.

To allow the State and the Bands to fulfill their responsibilities, they will provide each other with timely access to all available biological and harvest information. The procedures and timetable by which the information will be mutually shared is covered in a separate protocol. (See Protocol # 4.)

III. HARVESTABLE SURPLUS AND HARVEST MANAGEMENT UNITS.

A. Wildlife.

The State has developed and utilized methodologies for calculating the harvestable surplus of bear, antlerless deer, wild turkey, and registered furbearers (bobcat, otter, marten, lynx and fisher). The State calculates the harvestable surplus of these animals in areas ("harvest management units") that do not coincide with the boundaries of the Ceded Territory; some of these units are wholly inside or wholly outside the Ceded Territory, and others include lands and waters that are partially inside and partially outside the Ceded Territory. The State believes that its existing methodologies and harvest management units for calculating harvestable surpluses are consistent with the ability of the entire ecosystem to support these resources, and are based on sound resource data that considers human and cultural values.

The State desires to continue using its current methodologies and harvest management units for calculating the harvestable surplus of bear, antlerless deer, wild turkey, and registered furbearers in the Ceded Territory. For harvest management units that cross the boundaries of the Ceded Territory, the State proposes to calculate the harvestable surplus for the portion of the unit within the Ceded Territory on the basis of the percentage of the unit's total acreage that is within the Ceded Territory.

The Bands do not now have information or experience to suggest that the State's existing methodologies or harvest management units for calculating harvestable

surpluses for these species will violate their treaty rights. Accordingly, they have agreed to limit treaty harvests of these species by adopting harvest quotas within each of the State's existing harvest management units, and have not objected to the continued use of the State's existing methodologies for calculating harvestable surpluses within those units, including its proposal for calculating harvestable surpluses in the Ceded Territory portion of a unit that is only partially within the Ceded Territory. To enable the Bands to: (1) better understand the State's methodologies and their impact on treaty harvests; and (2) insure that such methodologies take into account the Bands' views of "sound resource data" and the Bands' "human and cultural values", the State agrees to fully involve the Bands' technical representatives in the annual calculations of the harvestable surpluses. This will include involving representatives of the Bands in meetings with Area DNR managers, State management committees or working groups where harvestable surplus or quota calculations are discussed.

If the Bands develop concerns regarding the State's methodologies, harvestable surplus calculations or harvest management units, they will present their concerns to the 1837 Ceded Territory Wildlife and Plant Committee, and seek to resolve their concerns through the committee and mediation process established in Protocol No. 2. Similarly, if the State seeks to change its methodologies, harvestable surplus calculations or harvest management units, it will present its proposal for a new methodology, calculation or unit to the Wildlife Committee, together with any supporting rationale, and seek the

Bands' concurrence through the committee and mediation process. In the absence of agreement on such matters following the committee and mediation process, either the State or the Bands have the option of invoking the court's continuing jurisdiction to seek resolution of the matter, unless the court has determined that one party has the authority to resolve the matter unilaterally and that its decision cannot be challenged in court.[1]

The Bands and the State agree to work cooperatively through the 1837 Ceded Territory Wildlife and Plant Committee to gather information about the moose population in Nemadji State Forest and elsewhere in the Ceded Territory, and to close State deer registration block 184 to all moose harvests pending a determination through the committee (and if necessary dispute resolution) process that the population is capable of withstanding harvest or a sustainable population will not survive there in any event. The Bands further agree, for the period 1997-2001, that they will not harvest more than five moose per year outside of State deer registration block 184 under Conservation Code § 6.24, and will propose a limit on such harvests for future years on or before June 15, 2000. Any disagreement over that limit will be

[1] The State contends it has authority to resolve disputes over the harvestable surplus of a species unilaterally and that its decision cannot be challenged by the Bands in court. The Bands dispute this. They propose that, in the event of a dispute over harvestable surplus levels, a neutral expert, jointly selected by the State and the Bands, be given authority to determine such levels on an interim basis, pending resolution of the matter by the parties or the court.

resolved through the committee and dispute resolution process.

Subject to future adjustments through the 1837 Ceded Territory Wildlife and Plant Committee or the dispute resolution process, the Bands agree to prohibit the harvest of beardless wild turkey.

B. Fisheries.

With limited exceptions outside the Ceded Territory, the State has not previously used harvestable surplus calculations to manage fisheries. However, the State is moving toward individual waters management. The State and the Bands have agreed to the initial methods for calculating the harvestable surplus of fish outlined in Attachment A hereto. The State and the Bands will utilize the 1837 Ceded Territory Fisheries Committee as the forum to address changes in those methods or concerns about the calculations, in accordance with the provisions of Protocol No. 1. In the absence of agreement regarding such matters following the committee and mediation process, either the State or the Bands have the option of invoking the court's continuing jurisdiction to seek resolution of the matter, unless the court has determined that one party has the authority to resolve the matter unilaterally and that its decision may not be challenged in court.

The Bands will not authorize open-water spear or net fisheries in lakes other than Mille Lacs that exceed the threshold level set forth below unless a standard gillnet survey has been conducted on the lake within 24 months

before the beginning of the fishing year. The threshold level is:

- for lakes over 1,000 acres, either (a) 3 standard 100-foot gillnet sets per 100 surface acres per year; (b) 0.2 walleye per surface acre taken by open-water spear fishing per year; or (c) a percentage of each component, provided the sum of the percentages does not exceed 100 percent;

- for lakes under 1,000 acres, either (a) 2 standard 100-foot gillnet sets per 100 surface acres per year; (b) 0.2 walleye per surface acre taken by open-water spear fishing per year; or (c) a percentage of each component, provided the sum of the percentages does not exceed 100 percent;

- the number of gillnet sets will be rounded up to the nearest integer (for example, in a 1,210 acre lake, the threshold level would be 37 since 3 x 12.1 = 36.3).

The State will not have to adjust the regulation of its fisheries on those lakes in which Band harvests in open-water spear and net fisheries will be at or below the threshold level. The Bands and the State will review the biological impact of such Band and State harvests and consider appropriate revisions at the end of a three-year trial period.[2]

The State agrees that Band or Great Lakes Indian Fish and Wildlife personnel authorized by the Bands may

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[2] The State and the Bands disagree as to whether there is a conservation concern with respect to any gillnetting in lakes smaller than 1,000 acres. This issue will be presented to the court for final resolution. If the court determines that gillnetting may be conducted in these lakes, the above provision will govern such harvest.

conduct fisheries assessments and that the results of such assessments may be utilized in calculating harvestable surplus levels as provided in Attachment A, provided that the assessments are conducted pursuant to a protocol agreed upon by the parties.

Fish captured in gillnets may only be released as follows:

> muskellunge may be released if they appear capable of surviving;
>
> northern pike may be released if they appear capable of surviving, but 35 percent of those released when water temperatures at the 3 to 4 foot depth are between 50 and 60 degrees, and 100 percent of those released when such temperatures are over 60 degrees, shall count against any applicable quota (these rates shall be subject to review by the Fisheries Committee on the basis of the best available mortality data);
>
> yellow perch may be released if water temperatures are below 50 degrees and the fish appear capable of surviving; all others shall be retained and count against any applicable quota;
>
> tullibee may not be released; all fish must be retained and shall count against any applicable quota;
>
> smallmouth bass and other species captured incidentally in gillnets may be released if they appear capable of surviving; all others shall be retained and count against any applicable quota.

As used herein, the phrase "appears capable of surviving" refers to fish that are able to maintain themselves upright.

The Bands and the State agree to manage their fisheries to remain within their respective shares of the harvestable surplus. During an initial three-year trial period, there will be no prescribed penalties for quota overruns. The parties will seek agreement through the Fisheries Committee on a mechanism to address quota overruns thereafter.

IV. SCIENTIFIC INVESTIGATIONS.

The State and the Bands will coordinate their efforts to research the Ceded Territory's natural resources, and make best efforts to insure that research projects are not impeded, interfered with, or unnecessarily duplicated by other parties. The appropriate 1837 Ceded Territory Resource Committee should review and evaluate all such proposals, and the dispute resolution procedure in the committee protocol should be used to resolve any disputes about them. The parties shall diligently and in good faith endeavor to maximize the usefulness and consistency of their scientific investigations. Band proposals for scientific investigations that involve harvest or collection activities not otherwise permitted under the Bands' 1837 Treaty Conservation Codes, including all investigations by non-Band members, shall be subject to prior State approval, but the State may not unreasonably delay or deny such approval. The State may deny such approval for investigations by Band members only for conservation, health or safety reasons authorized by the court in its Phase I decision. For informational purposes, the Bands shall notify the State of any scientific investigations that involve harvest activities permitted under their

Codes, and shall share the data collected during the course of the investigation. Similarly, the State shall notify the Bands of any scientific investigations it conducts (or which are conducted on its behalf), and shall share with the Bands the data collected during the course of the investigation.

V. FISH STOCKING.

The Band Commissioner shall not issue a permit under Conservation Code Section 3.06A, Subsection 1, without prior approval by the State, but the State shall not unreasonably delay or deny such approval.

VI. ENDANGERED OR THREATENED SPECIES.

The State and the Bands agree that Mille Lacs Band's Commissioner of Natural Resources may issue permits under the Bands' Conservation Codes, § 3.25, only in the following circumstances: (1) for scientific investigation or rehabilitation of a threatened or endangered species, but only upon approval of the project by the State pursuant to Part IV of this protocol; (2) for ceremonial or religious use by a Band member of a threatened or endangered species, but only upon: (i) a determination by the Mille Lacs Band's Commissioner that such use will not be detrimental to the species; and (ii) 24-hours prior notice to the State, during which period the State does not object in writing to the permit; or (3) when the circumstances set forth in Minn. R. 6212.2000 are present. Except where prior notice is required, the Mille Lacs Band's Commissioner shall provide immediate notice to the State of any

permit issued under Band Code § 3.25, and any dispute between the Commissioner and the State regarding the issuance of such a permit shall be resolved in accordance with the dispute resolution procedures in the committee protocols. In the event the State objects in writing to a ceremonial or religious permit during the 24-hour notice period, the State Commissioner of Natural Resources or one of his or her deputies shall enter into immediate discussions with the Bands in an attempt to resolve the dispute. If the dispute is not resolved, the Bands may elect to pursue it through the dispute resolution procedures outlined in the committee protocols. The Bands may withdraw from their agreement to provide 24-hour prior notice if in practice State objections impair Band member ceremonial or religious harvests. The Bands will give the State sixty days' notice of their intent to withdraw, and the State and the Bands will seek an alternative arrangement for notice and objections through the committee process. Nothing herein shall limit or affect Band members' rights under federal law to freely exercise their religion, or to assert such rights in defense to any prosecution or enforcement action.

VII. 1837 CEDED TERRITORY COMMITTEES AND DISPUTE RESOLUTION.

The composition of the Fisheries and Wildlife and Plant Committees for the Minnesota 1837 Ceded Territory is outlined in separate protocols. The committees are charged among other things with gathering information, input and advice on resource management within the

Ceded Territory. The State and the Bands shall take regular part in these committees. Any disputes over the methodology for calculation of harvest numbers, changes to special designations, permit and quota areas, or harvest zones, or perceived discriminatory impact on treaty harvest, shall be raised with the committees before being referred to the balance of the dispute resolution process outlined in the protocols.

Protocol # 5 – Attachment A

Harvestable Surplus Methodologies for Fish within Minnesota Ceded Territory

Methodology for Mille Lacs Lake

Walleye – There are three primary steps in the management procedure for determining the annual harvestable surplus of walleye in Mille Lacs Lake: harvest strategy, stock assessment models, and harvest tactics. The management procedure is adaptable in the sense that various components will be updated as new, better information becomes available. Initially, the harvest strategy for walleye is an annual exploitation fraction of 24% of the vulnerable stock based on an $F_{0.1}$ exploitation policy. This harvest strategy may be revised as additional information is acquired such as the relative amount of effort put forth by the various fisheries (e.g. gillnet, spearing, and angling), or in light of the technical committee's decisions regarding an appropriate mesh size or sizes after the first five years of the fishery.

The management procedure is designed to use several stock assessment models for determining annual abundance of walleye. Initially, two assessment models will be used: (1) a survey-tuned virtual population analysis; and (2) a modified DeLury method to estimate abundance from survey data (i.e. the "Collie-Sissenwine Model"). Additional assessment models may be added as the technical committee continues its work.

The harvest tactics include all methods for harvesting fish, including gillnets, spears, and angling. During the first five years of fish harvest under the Band code, the Bands will phase in their harvests at low levels as specified in the Bands' interim fisheries management plan, and will fish a variety of gillnet mesh sizes as authorized under the Band Code and management plan. This will allow the technical committee to gain additional data on the effects of various harvest schemes, and the preferences and patterns of band harvest. This will provide the committee with information to determine the most appropriate mesh size or sizes in the future. At the same time, the State will experiment with various tactics for regulating the recreational fishery.

Yellow Perch, Tullibee/Cisco, and Burbot – Current biological information for these species is limited and thus precludes forecasting changes in abundance and quotas from year to year. Until such information becomes available, the following total annual quotas based on observed long-term harvests shall be used: yellow perch – 270,000 lbs.; tullibee/cisco – 24,000 lbs., and burbot – 28,000 lbs. If these species have been under-utilized, then these quotas will be conservative. The technical committee should therefore review these harvest levels during the first five

years of the mixed fishery, and adjust these quotas accordingly with new data collected during this five year period, and also existing data (e.g. age data) that has yet to be processed. Additional data for burbot may be difficult to obtain since catchability of this species is very low during the open water season. Potential development of a tribal winter fishery may provide data for more detailed stock assessment of burbot. When the appropriate data become available for any of these three species that may be harvested at a level close to their optimum yield, then a management procedure similar to that for walleye should be invoked.

Northern Pike – Northern pike population estimates are made each spring by mark and recapture methods. These estimates indicate that this population density is low, and thus can sustain maximum annual harvests of 23,000 pounds. Future population estimates for northern pike may be conducted on a biannual schedule, and will determine the need for future adjustments to total harvests.

Muskellunge – At this point in time, there is insufficient information about the level of Band incidental harvest of muskellunge in gillnets to warrant establishing a harvestable surplus quota on Lake Mille Lacs. As referenced in the Bands' fisheries management plan, if the numbers of muskellunge in gillnets exceed five (5) percent of the estimated muskellunge population (to be determined with the best available data), the Bands will institute time and/or area closures to reduce the capture of muskellunge in nets.

Methodology for lakes other than Mille Lacs

Walleye – The model for estimating safe walleye harvest levels for lakes other than Mille Lacs is

$$\text{pounds} = 0.32\ CPUE\ acres$$

if CPUE is the catch rate in a standard gillnet survey of the lake conducted 0-12 months before the beginning of the fishing year. The model is

$$\text{pounds} = 0.25\ CPUE\ acres$$

if the survey is conducted 12-24 months before the beginning of the fishing year. This method is based on the catchability model which uses catch rates in standard gillnet surveys to estimate population size, and incorporates a safe exploitation rate (0.25), mean weight (1.22), net efficiency (0.585), and maturity (0.56) factors.

Northern Pike – The average harvest level of northern pike preferred by anglers appears to be 2.3 pounds per acre. This level is based on lakes that had fishing mortality less than or equal to natural mortality ($F \leq M$) and is therefore conservative. It will be applied by the parties to northern pike over 23 inches. The Bands and the State will review the biological impact of this approach and may propose appropriate revisions at the end of a three-year trial period.

Bluegill, Largemouth Bass, Black Crappie, and Yellow Perch – Safe harvest levels for one or more of these species shall be imposed for those lakes where the Bands authorize commercial harvest of a specific species. Before any commercial harvest is authorized, a safe harvest level shall be agreed upon by the technical committee. The harvest level shall be estimated as a pounds/acre value,

and assigned by lake class. Additionally, if the level of Band subsistence harvest of one or more of these species on a given lake becomes high enough to cause concern over the total safe harvest, the technical committee shall review the information and make appropriate recommendations for regulation changes for Band and/or non-Band harvest.